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The Devil Is in the Lack of Details: How Design-Assist and Design Delegation Generate Risk for Project Participants

Contractors frequently sign agreements that include not only promises to build or install a particular scope but also to provide design services. A critical issue that must be resolved in interpreting any such construction agreement—perhaps *the* critical issue—is what exactly the parties intend to include within the “design services.”¹ The fact that these agreements typically use the terms “design-assist” or “delegated design” to define the design services only restates the issue—what did the parties intend, given that these terms are notoriously ambiguous. Various credible sources have attempted these ambiguities.² While the industry had to start somewhere, attempts at clarity still have a long way to go, and there is still no uniform consensus on the meaning of these widely used terms. This lack of consensus continues to create issues, risks, and liabilities for parties to construction contracts.

Section I provides an overview of design-assist and design delegation³ and discusses the current state of collaborative design ambiguities as well as industry efforts to address such ambiguities.⁴ Section II discusses “design liability creep” and evaluates design-assist and design delegation risks from the varying points of view of different project participants.⁵ Finally, Section III provides a series of practical considerations and practice pointers for parties to effectively manage design-assist and design delegation risks.⁶

I. Background

A. Overview of Design-Assist & Design Delegation

1. What is informal involvement?

Before addressing design delegation and design-assist, it is important to address the concept of “informal involvement.” The American Institute of Architects (“AIA”) and the American Institute of Steel Construction (“AISC”) recognize “informal involvement” as “an informal exchange of information between a design professional and contractor in which there is typically no agreement, no compensation, and no expectation that the contractor will guarantee or be responsible for the accuracy of information provided.”⁷ Unlike the more involved types of contractor design participation discussed in the sections that follow, in informal involvement, the contractor's input on design matters is merely that: input. “If the design professional needs more than an informal recommendation, the owner and contractor should enter into a written agreement where the contractor is compensated for time, cost, and risk involved in providing information.”⁸ Unless the parties specify otherwise, there are no expectations that the design professional will rely on the input, and the design professional is expected to use its own judgment in developing the design.⁹

2. What is design-assist, what is design delegation, and how do they compare?

What is design-assist? The honest answer: nobody can agree. Though design-assist remains undefined to any level of meaningful specificity, most would agree with the general proposition that design-assist is “a process by which the constructors collaborate with the project owner and the design professionals beginning in the design development phase to assist all parties in meeting the project's objectives.”¹⁰ Commentators refer to design-assist as a “process” because, unsurprisingly, no consensus exists on whether design-assist constitutes a procurement method in its own right or is instead a *technique* to be used across multiple procurement methods.¹¹ Whether classified as a procurement method or a technique, the underlying dynamic remains: design-assist involves contractor participation in the design development phase of a project. Contractors participating in design-assist collaboration are sometimes referred to as “design-assist contractors.”¹² Compare this to the traditional design-bid-build (“DBB”) model where the design team functions as an independent unit to formulate designs that are subsequently turned over to contractors and subcontractors to construct.¹³

The range of contractor involvement in design-assist models varies widely.¹⁴ However, one relatively consistent trend among design-assist activities is that these activities occur early on in project development.¹⁵ Such services may include constructability reviews, value engineering, conceptual design, design build, and everything in between.¹⁶ When performing these services, contractors often rely on their experience and expertise to provide the requested information.¹⁷ From the contractor's point of view, design-assist provides contractors an opportunity to suggest changes before construction is underway and ideally reduces the amount of change orders and constructability reviews that could otherwise lead to significant expenses and delays.

What is design delegation? Design delegation or “delegated design” often refers to a non-design professional's assumption of responsibility or liability for some aspect of the design. To that end, contractors must often hire their own design professionals to perform the professional services necessary to deliver delegated design services.¹⁸ In collaborative design delegation, the contractor often bases its design on design-professional-supplied performance criteria. While the design professional maintains responsibility for the performance criteria underlying the contractor's design and must still review all designs submitted by the contractor, the contractor retains responsibility for portions of the design it submits.

Delegated design is sometimes defined relative to design build:

*Delegated design is the transfer of responsibility, and all associated risk, for the design of a component system or element of a project to someone other than an Architect/Engineer/Design Professional of Record. In other words, Delegated Design focuses on specialty systems and is similar to design-build but, as applied, transfers far more risk to the subcontractor.*¹⁹

In this same vein, commentators refer to delegated design as the “cousin” of design build.²⁰ Though closely related, an oft-cited key difference between design build and delegated design is the extent of contractor responsibility and liability. In design build, the design build contractor typically assumes design responsibility for the entire project. By contrast, with delegated design, the contractor only assumes design responsibility for a specific component of the design.²¹ With responsibility comes liability.

Aspects of design that are frequently delegated to contractors are “specialty systems,” such as “pre-fabricated stairs, steel connections, tilt-up precast panels, and ... curtain wall and exterior cladding systems,”²² as well as electrical, mechanical, and plumbing systems, though the range of design-delegation activities will vary by both project and trade.²³ Design delegation may also be more broadly or generically defined to include services that do not necessarily require a design license or associated design responsibility such as constructability reviews, preparation of cost estimates, preparation of schedule requirements, and assistance with value engineering.²⁴

How do design-assist and design delegation compare to one another? “The distinctions between ‘design assist’ and ‘design delegation’ often are more in the nature of gradations than black-and-white.”²⁵ Some commentators suggest the extent of similarities between design-assist and design delegation include only the basics: both involve contractual relationships among individuals with design and/or building expertise, and both involve a dynamic where the design team can rely on information provided by a non-design professional in preparing aspects of the design.²⁶ More noteworthy than their limited similarities are the differences between design-assist and design delegation.

The main point of divergence between design-assist and design delegation concerns liability and who carries responsibility for the design. In design delegation, assumption of design responsibility coincides with assumption of design liability.²⁷ When elements of the design are delegated to the contractor, the contractor becomes responsible for compliance with state licensure laws and its design professional may become the designer of record for that component.²⁸ To address this, contractors often retain their own third party design professional who specializes in the specific aspect of design that has been delegated.²⁹ With delegated design, the contractor often bases its portion of the design on performance criteria established by the design professional.³⁰ While the contractor undertakes responsibility for the design, the design professional still maintains liability for the sufficiency of the design performance criterion.³¹ Unlike delegated design, contractors participating in design-assist *do not* assume liability for portions of the design to which they contribute.³²

Design-assist and design delegation also differ based on when they come into play throughout the life of the project.³³ Design-assist thrives when implemented as early in the project as possible.³⁴ By contrast, design delegation is more likely to be implemented after the initial design documents and performance criteria are identified by the “Architect/Engineer/Design Professional” of record.³⁵

B. The Current State of Collaborative Design Ambiguities

The plain meaning of “design-assist” is uselessly broad, and “design delegation” is no better. The term “design” can stretch as far as “an outline, sketch, or plan, as of the form and structure of a work of art, an edifice, or a machine to be constructed.”³⁶ The term “assist” means “to give support or aid to; help.”³⁷ To “delegate” means “to send or appoint ...; to commit to another ...”³⁸ Starting from such a broad foundation, it comes as no surprise that design-assist “has grown organically with different people ascribing different characteristics to it.”³⁹ The outlook is not much better for design delegation, considering that “each state’s existing professional and trade licensing statutes reflect their own public policies, [and] the various models in which they attempt to address design delegation, if at all, are not consistent.”⁴⁰

The lack of industry standard definitions enables a self-perpetuating cycle of uncertainty. Because there are no standard definitions of design-assist and design delegation, many parties do not mention or include these terms in their contracts; if they do, they often do so mistakenly or with bland generalizations that provide little practical guidance.⁴¹ In turn, when courts analyze and interpret parties’ contracts, seldom are they prompted to delve into the meaning of design-assist or design delegation.⁴² Additionally, only a handful of states have any codified reference to design-assist and/or design delegation, and none of these statutes meaningfully or authoritatively explain or define the scope of work that is, or ought to be, included in these processes.⁴³

1. Fundamental Confusions About the Meaning of Design-Assist and Design Delegation

The first fundamental confusion regarding design-assist and design delegation is the idea that either of these are the same thing as “design build.” While some contend that design-assist is the result of the increased use of design build,⁴⁴ and while design delegation and design build have been considered “cousins” of one another, none of these terms are synonymous.⁴⁵ The design-assist and design build models both allow for the involvement of the design and construction teams early in the process, but

design build “does not necessarily require the input of the construction team during the design phase of the project.”⁴⁶ By contrast, the hallmark characteristic of design-assist is that contractors participate in the design phase of the project. Similarly, even though design build and design delegation both involve collaborative elements, design delegation allocates only *some* responsibility, whereas in the design build context, design responsibility remains always with the design-build constructor.

Another common misunderstanding of design-assist relates to the scope of contractor involvement, specifically with regard to which part of the project a contractor is expected to “assist.” This misunderstanding permeates even the most general aspects of design-assist. For instance, some contractors presume that if they are hired to perform design-assist services, they will also be selected to perform project construction.⁴⁷ Right, wrong, or indifferent, owners and general contractors may not be on the same page and might view design-assist as a lone-standing service that does not guarantee selection for project construction.⁴⁸

As for design delegation, the scope of contractor involvement is mentioned and discussed with more frequency than design-assist, but these discussions and notations have yet to provide comprehensive clarity. Though statutes reference design delegation more frequently than design-assist, “[t]o the extent they exist, laws vary widely regarding the permissibility and the processes by which design may be delegated.”⁴⁹ This means that what passes muster in one state might be prohibited or illegal in another.⁵⁰ Consequently, it could be argued that some of the increased efforts to provide further specificity regarding design delegation have done more to confuse than to clarify the issue.

2. Dearth of Case Law Addressing Design-Assist and Design Delegation

As of this Article's publication, the meaning of “design-assist” remains up in the air.⁵¹ Of all state and federal cases⁵² available on the Westlaw database, only 21 specifically mention design-assist.⁵³ Of those cases, four results contained false positives, where the terms “design” and “assist” showed up next to each other as separate items, or in a context irrelevant to the scope of this Article.⁵⁴ The other 17 cases mention design-assist only superficially, or in passing, to describe the terms of contracts or a party's area of expertise.⁵⁵ At best, select trial court documents and case briefings provide insight into what design-assist may have encompassed on a case-specific basis.⁵⁶ However, state and federal courts have yet to render instructive opinions that discuss practical specifics of design-assist.⁵⁷ As it stands, case law provides little to no guidance in determining what design-assist objectively means.⁵⁸

Similarly, when searching “delegated design” and “design delegation,” in case law from the Westlaw database, a total of 10 results surface.⁵⁹ Of these results, five were false positives that were included in search results because the words appeared next to one another without actually referring to “design delegation” or “delegated design.”⁶⁰

Other cases discuss design delegation and design-assist conceptually, but they do not specifically reference “design delegation” or “design-assist.”⁶¹ For example, in *Coghlin Electrical Contractors, Inc. v. Gilbane Building Co.*,⁶² the Supreme Judicial Court of Massachusetts noted that a “[construction manager at risk]'s [(CMAR)] level of participation in the design phase of the project and the extent to which the contract delegates design responsibility to the CMAR may affect a fact finder's determination as to whether the CMAR's reliance was reasonable.”⁶³ *Coghlin* and similar cases illustrate that risks associated with design delegation and design-assist will present themselves regardless of whether the courts use the specific terms.

3. Statutory Silence and the Proverbial Crossing of the “Professional Services” Line

One of the most threatening aspects of design delegation and design-assist scope ambiguities concerns the risk that contractors might unknowingly cross the line into “professional services.” In both of these collaborative design dynamics, contractors could face liability for violating statutes that prohibit unlicensed professionals from performing professional services. The trickiest

aspect of all of this is that the boundaries for “professional services” are a moving target due to current ambiguities. Each jurisdiction draws its lines differently, making them easier to unwittingly or unintentionally cross.

The distinction is not merely academic: a contractor's performance of unlicensed professional services can have massive consequences ranging from professional and disciplinary fines, to insurance exclusions and criminal charges.⁶⁴ All 50 states and the District of Columbia regulate professional design practices, such as engineering.⁶⁵ It is imperative that contractors are aware of these regulations so as not to unwittingly perform professional services as part of performing their design-assist or design delegation contract. As one commentator observed, though some unlicensed design practice happens intentionally and/or irresponsibly, the disconcerting truth is that “[i]n between the shoulda-known-betters and the downright crooks are *a lot of overreaching drafters and builders* ...”⁶⁶ The inherent natures of design-assist and design delegation pose a heightened risk of inadvertent unlicensed professional practice not common to the DBB model.⁶⁷

While all United States jurisdictions have taken steps to define the practices that will incur professional liability, these jurisdictions provide little guidance on the related concepts of design delegation and design-assist. Some might argue to the contrary, taking the position that licensure statutes constitute de facto regulations of the design-assist and design delegation processes.⁶⁸

Statutes specifically addressing design delegation do little to clear the air, because most statutes that do address design delegation do so only vaguely by, for example, permitting public contracts to utilize design delegation in some form or another.⁶⁹ Moreover, in some instances, a jurisdiction's attempt to address design delegation may pose more risk than the uncertainties they were designed to address, because some design delegation statutes “present potentially irreconcilable inconsistencies with other aspects of the jurisdiction's regulatory framework.”⁷⁰ While existing statutes prescribe the outer boundaries of permissible activities for contractors, they do little to inform collaborative design teams of expectations, standards of care, and associated liabilities concerning design delegation.

Guidance is equally, if not even more, grim regarding design-assist. Generally, Ohio and Nevada are the only states with statutes that specifically incorporate the term “design-assist.”⁷¹ Nevada's mention of “design-assist” only goes as far as mandating contractors indicate on public project proposals whether they intend to use design-assist.⁷² Ohio's coverage of design-assist has a bit more meat than Nevada's, but it still evades the arduous task of actually defining what “design-assist” means.⁷³ The Ohio statute provides the following vague overview:

“Design-assist services” means monitoring and assisting in the completion of plans and specifications.

“Design-assist firm” means a person capable of providing design-assist services.⁷⁴

The Ohio Revised Code's other mention of design-assist merely authorizes use of design-assist on public projects, but it does not discuss the scope specifics of what this entails.⁷⁵ Ohio may be ahead of the game in taking steps to recognize the rising prevalence of design-assist, but its overview of design-assist does little to address or clarify the boundaries of activities that take place within the design-assist ambit.

Few local regulations and administrative codes address design-assist, and those that do provide little more insight than the relevant state statutes.⁷⁶ For example, the District of Columbia's Municipal Regulations merely authorize the use of design-assist, but the extent of the regulations' detail about the term is superficial, stating that it is an approach where “a portion of the design work—typically the mechanical, electrical, and plumbing systems—is managed by the contractor.”⁷⁷ The regulation

does not elaborate on the meaning of “managing” these aspects of design and does not indicate whether “managing” equates to incurred liability. Similarly, the Utah Administrative Code authorizes use of design-assist on certain projects and prescribes certain criteria that must be met for the project to be eligible for design-assist.⁷⁸ The Utah Administrative Code also lists some of the activities that might fall within the design-assist contractor's ambit, including “providing construction estimates, details and documents, as well as the construction or installation of materials or products into the project.”⁷⁹ The Utah Administrative Code provides perhaps the most instruction of all state directives, but stops short of providing practical assistance to the parties as they determine who is responsible for what aspects of the design.

4. Inconsistency Among Construction Industry Players

Given the lack of top-down definitional guidance as to the boundaries and scopes of design-assist and design delegation, it should come as no surprise that different trades and occupations have different understandings of design-assist and design delegation and the activities they encompass. Correspondingly, different understandings persist regarding the amount of responsibility these collaborative design methods transfer to contractors.

In practice, misunderstandings of delegated design frequently stem from the specifics of the job, rather than fundamental differences about what “delegated design” means. “Complications relating to delegated design are not uncommon,” and they usually include “misunderstandings of roles and responsibilities, whether contractual or design related.”⁸⁰ It should come as no surprise that design delegation creates confusion, especially considering that even absent the delegation element, design-related issues are significant sources of uncertainty, in and of themselves. A 2014 study surveyed over 300 participants (including owners, architects, and contractors) and asked each to rank seven different sources of uncertainty in construction projects according to “the frequency with which each [source of uncertainty] is encountered and the typical project cost impact when it occurs.”⁸¹ Of the seven different project-related challenges, “design communication gaps” and “design or documentation mistakes” were ranked second and fifth, respectively.⁸² Add in the complexities associated with delegating certain aspects of the design and the fact that there are endless possibilities as to the types of work that can be delegated, it becomes clear that absent contractual specificity, the ambiguity surrounding design delegation could wreak havoc on a construction project.

When it comes to design-assist, however, misunderstandings range from foundational to specific, with different participants having different ideas of what “design assist” even means. Contractors and construction managers will generally view basic design-assist activities to exclude “professional services.”⁸³ Those in the construction insurance trade would likely characterize many design-assist activities as “professional services.”⁸⁴ From the contractor's point of view, the AISC has stated that for steel constructors and erectors participating in design-assist, such participation includes things like commenting on constructability, suggesting areas of improved efficiency, and providing preliminary pricing.⁸⁵ Meanwhile, there are cases where insurance companies have excluded those same activities from coverage because the insurance contract characterized the activities as “professional services.”⁸⁶

Even more fundamentally, design-assist contractors may have disappointed expectations regarding whether design-assist participation guarantees their subsequent participation in project construction.⁸⁷ Some contractors believe design-assist participation is part and parcel with construction participation. By contrast, others see design-assist as a stand-alone function that does not guarantee continued participation through the construction phase of the project.⁸⁸ More specific discrepancies concern the nature of the work a design-assist contractor will provide. For instance, “[g]eneral contractors and construction managers, on the one hand, generally believe that the design-assist process does not entail the procurement of design services from the construction trades. Specialty trade contractors, on the other hand, commonly contend they routinely provide design services when performing as design-assist contractors.”⁸⁹

These inconsistencies intensify the challenge of interpretation when the contract is silent.⁹⁰ In *AdvanceTEC, LLC v. Wohlsen Construction Company*,⁹¹ a specialty subcontractor sought to prohibit a general contractor's use of designs provided during the design-assist process.⁹² The subcontractor argued that it made clear to the general contractor that the general contractor's right to the subcontractor's design-assist deliverables would terminate if the general contractor did not hire the subcontractor for the project.⁹³ While the subcontractor communicated this concern in emails, the parties' design-assist contract did not mention the topic.⁹⁴ The court interpreted the contract and determined that the general contractor's right to use the design-assist work was *not* contingent on the general contractor selecting the subcontractor as the project's subcontractor.⁹⁵

Corresponsive with their different understandings of design *responsibility*, different trades also have different understandings of design *liability* in the design-assist context. One 2018 study indicated that as between 80 surveyed contractors and subcontractors (59 construction manager ("CM")/general contractors ("GC") and 21 specialty subcontractors), about 20% of CMs/GCs believed that design-assist "*definitely [does] not*" transfer design liability, compared to 0% of subcontractors surveyed.⁹⁶ On the opposite end of the spectrum, among survey participants, 9.4% of CMs/GCs believed that design-assist *definitely does* transfer design liability, compared to 16.7% of subcontractors who espoused this same belief.⁹⁷ Other survey participants answered somewhere in between.⁹⁸ These statistics typify the varying definitions and understandings of design-assist that can lead to disappointed expectations and conflict down the road.

Contractors providing design-assist services should clarify their expectations regarding how the pre-construction design-assist function relates to project construction. If a contractor expects its provision of design-assist services to lead to selection for project construction, the contract needs to specify this expectation. "The failure to clearly address this point in contractual arrangements can be a recipe for conflict."⁹⁹

C. Industry Attempts to Address Ambiguities

Some of the most valiant attempts at clarifying design-assist and design delegation can be found in industry standard form contracts. However, most of these standard contracts speak in general terms with little specificity.¹⁰⁰ Nonetheless, at the present time it is the only uniform guidance that is widely available in the industry. Both the AIA and ConsensusDocs standard forms attempt to address design delegation and both organizations have recently started to address design-assist, as well. Addressing both design-assist and design delegation, the AIA and the AISC also partnered in an attempt to better define and distinguish design-assist and design delegation through a white paper publication.¹⁰¹

1. ConsensusDocs and Design Delegation

The ConsensusDocs 200, Agreement and General Conditions Between Owner and Constructor,¹⁰² ("CD 200"), refers to general allocations of responsibility in the design delegation context. Section 3.15 states,

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 the 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 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, show drawings, and other submittals related to the Work designed or certified by Constructor's design professional.¹⁰³

Section 3.15 should be commended for the fact that it recognizes the necessary involvement of a design professional in design delegation, and that some of these responsibilities must be allocated accordingly. However, the general nature of the contract provides little practical guidance because “how design delegation is to operate effectively in practice [is in] granular details.”¹⁰⁴

The efficacy of CD 200's effort to bring clarity to design delegation is limited by lack of detail and questionable assumptions. The general terms of section 3.15 operate on the assumption that design specifications have been provided and that they will be sufficient for the constructor. This is problematic when those plans and specifications are not adequate, but CD 200 nonetheless holds the constructor responsible for providing “all materials, equipment, and services necessary to complete the Work, all of which shall be provided in full accord with the Contract Documents and shall include all Work reasonably inferable from the Contract Documents.”¹⁰⁵ Moreover, the user guidance for CD 200 states that “[t]his document presumes that the Owner will be hiring a Design Professional to provide design services.”¹⁰⁶ The guidance accompanying CD 200 also directs reference to ConsensusDocs 240 or 245 for more detail regarding the owner/designer relationship. The guidebook accompanying CD 200 (the “CD 200 Guidebook”) includes comments from the American Subcontractors Association (“ASA”), which cautions that “[c]onstructors should not ordinarily accept responsibility for design. When design services are requested, the delegation should be specific and should include all design and performance criteria.”¹⁰⁷

2. ConsensusDocs Turn to Design-Assist

At the time of drafting this Article's predecessor version in 2016,¹⁰⁸ no standard contracts proffered even a suggested definition or scope of work for design-assist contractors, and no trade groups had attempted to bring clarity to the issue, either. The ConsensusDocs and their accompanying guidebooks have since started to fill the industry's void of design-assist guidance.¹⁰⁹

In 2019, ConsensusDocs released a standard design-assist contract addendum, titled ConsensusDocs 541 Design-Assist Addendum (“CD 541 Addendum”).¹¹⁰ CD 541 Addendum provides parties to construction contracts with a baseline contract to help address various design-assist issues.¹¹¹ To elaborate on some of CD 541 Addendum's loose ends, ConsensusDocs also released a supplemental Guidebook to the ConsensusDocs 541 Design-Assist Addendum.¹¹² CD 541 Addendum provides contracting parties with a design-assist menu: it lays out a series of options and best practices allowing users to select those that best fit their needs and the needs of their project.¹¹³ Article 5 of CD 541 Addendum, titled “Optional Additional Design Assist Services,” lists various potential design-assist services for users to select from.¹¹⁴ A subheading to Article 5, indicates “[t]he checked boxes below indicate services being added to the design-assist scope of work.”¹¹⁵ The other Articles follow this same format.

The ConsensusDocs, through the release of CD 541 Addendum and its Guidebook, have made substantial headway in reaching an industry-wide consensus on the meaning and scope of design-assist, and CD 541 Addendum and its Guidebook boast several benefits for users. One benefit is that at the very least, the content and issues in the documents can be used as talking points during contract negotiations. When it comes to design-assist, meanings are so scattered and varied that it is very possible contracting parties are unaware of whether and to what extent they are misunderstanding one another. Take, for example, Article 3, Section 3.2, which clarifies that it is the anticipation of the parties that the design-assist contractor will continue its participation into the construction phase, as well.¹¹⁶ If confronted with a provision like this during the contract negotiation phase, it is possible the *AdvanceTEC* dispute never would have seen the light of day.¹¹⁷ Use of the ConsensusDocs design-assist document addresses the “oblivious oblivion” concern and provides an expansive scope of things that the parties will need to consider at the inception of their relationship. Additionally, use of CD 541 Addendum has cost- and time-savings potential, as parties will avoid having to re-invent the wheel.

While CD 541 Addendum and its Guidebook have many positive aspects, they have some constraints, as well. Most notably, CD 541 Addendum provides clarity only on a project-specific basis, and only to the extent parties actually use it. As mentioned, many significant portions of CD 541 Addendum—i.e., scope of work regarding additional design-assist duties—are formatted as a user-friendly menu where specifics need to be selected. In this way, CD 541 Addendum is a vehicle that won't drive itself: the benefits of CD 541 Addendum will only be realized if parties actually *use* it. As a result, while CD 541 Addendum and its Guidebook might clarify what design-assist can look like for that particular project, the documents do little—or nothing—to clarify design-assist ambiguities for those who have not incorporated the documents' provisions into their agreement on their specific project.

Other downsides are trade specific. As discussed throughout, design-assist requires design professionals to collaborate with non-designers in the design development phase of a project. For design professionals, this could mean increasing liability for work they did not perform or relinquishing control without relinquishing responsibility and corresponding liability. To that end, design professionals may be eager to modify CD 541 Addendum's Article 4, section 4.3. This section states in part,

It is recognized that, in their review of the design, [design-assist contractors] and [their] subcontractors ... are not acting in the capacity of licensed design professionals or assuming any design liability.

Design professionals may find this provision problematic for multiple reasons, especially when the scope of a contractor's design work is ambiguous or heavy on the “design” aspect, and the design professional ends up taking on liability for another's designs.

Additionally, design-assist contractors may take issue with the various services in the ConsensusDocs that may constitute “professional services” under their insurance policy and/or applicable statutes. Owners' ears should perk up at this, as well. It is important to acknowledge that collaborative design on construction projects can confound traditional trade boundaries, in that they require both “expertise and experience, as well as hard, dirt-under-the-fingernails, labor.”¹¹⁸ Design-assist marries these together even further. As a result, when things go wrong, it is important to determine whether the thing that went wrong can be characterized as a “professional service.”¹¹⁹ As discussed more fully below, many commercial general liability (“CGL”) policies will not cover damage incurred as the result of professional services, absent an endorsement. Under CD 541 Addendum, however, many of the activities the design-assist contractor may be performing would constitute a “professional service” under the relevant CGL policy. This means that a contractor who damages the owner's property in the course of performing a “professional service” may be on the hook to foot the entire bill. Depending on the nature of the damages, this will not be a viable option for many contractors. In turn, the owner is left hanging out to dry. With this in mind, it is possible that activities in CD 541 Addendum exceed the bounds of common CGL policies.

3. AIA's Design-Assist Addendum

As of this Article's drafting, CD 541 Addendum is the primary widely circulated standard form contract that delves into design-assist in any real detail. The AIA has a relevant standard form document that deserves mention: the AIA Document C403-2021 is the AIA Standard Form of Agreement Between Client and Consultant for Design Assist Services and notes general responsibilities related to the provision of design-assist Services.¹²⁰ However, C403 leaves it to the parties to outline and describe the scope of the design-assist services to be provided on the project.¹²¹ Without the parties' own scope additions, the general terms of C403 do little to clarify the nature of the design-assist relationship. One notable aspect of C403 is that Article 5, section 5.3, places liability on the design-assist Consultant, stating, “[t]he Client and other Project Participants shall be entitled to rely on, and shall not be responsible for, the accuracy, completeness, and timeliness of services and information furnished by the Consultant.” A few clauses later in Article 5, section 5.10 states that “[t]he Client shall review the Design Assist Services and Deliverables and provide prompt written notice to the Consultant if the Client observes or otherwise becomes aware of any errors, omissions, or inconsistencies in such services or Deliverables,” but stops short of fully assigning to the

Client the duty to detect errors, omissions, or inconsistencies. The vague terms of C403 do little to clarify for contracting parties what design-assist services actually entail.

Other standard form contracts, such as AIA Document A133-2019 Standard Form of Agreement Between Owner and Construction Manager as Constructor (“A133-2019”), do not expressly use the term “design-assist,” but “[t]he preconstruction phase services, and caveats to those services, described in A133 are easily recognizable as having a Design Assist collaborative flavor.”¹²² Specifically, section 3.1.1 states, “[t]he Owner and Architect shall be entitled to rely on, and shall not be responsible for, the accuracy, completeness, and timeliness of services and information furnished by the Construction Manager.”¹²³ This section simultaneously clarifies that “[t]he Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price.”¹²⁴ Resembling other definitions of design-assist, section 3.1.3.2 describes the Construction Manager’s role in assisting the Owner and Architect:

[T]he Construction Manager shall also provide recommendations to the Owner and Architect, consistent with the Project requirements, on constructability; availability of materials and labor; time requirements for procurement, installation, and construction; prefabrication; and factors related to construction costs including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.¹²⁵

Other aspects of participation include creation and updates to project schedules, as well as cost estimates during the design phase.¹²⁶ These elements of A133-2019 are reminiscent of the design-assist concept in that they involve collaboration between the design professional and the construction manager, and they engage the contractor in the early phases of design development.¹²⁷ However, contradictory to understandings of design-assist that cabin liability with the design professional, it could be possible that section 3.1.1—entitling the Owner and Architect to rely on the Construction Manager’s information—could shift liability to the Construction Manager. While aspects of A133-2019 resemble some understandings of design-assist, A133-2019 leaves much up for debate in terms of design-assist ambiguity.

4. AIA & AISC Provide Informal, Yet Instructive Commentary

In attempts to address such ambiguities, the AIA and the AISC partnered to draft a two-part white paper series titled, “Design Collaboration on Construction Projects.”¹²⁸ The goal of the white paper series is to “provide general guidance about design collaboration strategies used on construction projects.”¹²⁹ Part 1 of the series, “Delegated Design, Design Assist, and Informal Involvement—what does it all mean?”, uses general terms to describe the roles and responsibilities of different project participants when using different collaborative construction methods including delegated design and design-assist.¹³⁰ Part 2, still to be released, will be specific to design-assist in the steel construction context.¹³¹

Part 1 distills the main distinctions between design-assist and design delegation. Key points of distinction include: “(1) whether the contractor is merely providing input to influence a design or is taking contractual responsibility for a portion of the design itself, (2) the nature and timing of contractor involvement, and (3) the degree of liability that flows from the contractor’s involvement.”¹³² Differences aside, Part 1 underscores that for both delegated design and design-assist, the appropriate time for contractor involvement is during the design development phase, with the understanding that design delegation sometimes comes into play later.¹³³ The white paper explains that, “[i]f not properly planned, ad hoc or late occurring contractor involvement can have significant impacts on the timely development or revision of the design and the resources budgeted by the design team or others.”¹³⁴ Another marked similarity between design-assist and design delegation is that “[t]hese collaborative techniques can happen in the context of many different relationships on a project, in every delivery method, and along any tier of the design and construction team hierarchy.”¹³⁵

Despite its approachability and succinct synopsis of design-assist and design delegation, Part 1 leaves many areas for further development. For example, Part 1 indicates it intends to “to apply in a general way to all the different disciplines and different types of ‘contractors’ and ‘design professionals’ that can participate across the industry in the different forms of collaboration discussed in [Part 1].”¹³⁶ Though useful for providing an informative starting point, this approach provides little to no practical utility. As noted above, different types of “contractors” have different understandings of what design-assist and design delegation entail—a one-size-fits-all approach fails to recognize the underlying roots of ambiguity and, thus, falls short of providing practical resolve and guidance.

The white paper does not address liability risks for designers. The white paper acknowledges that collaborative design strategies such as design delegation and design-assist “range from informal discussions all the way to contractor acceptance of responsibility for elements of the project’s design,”¹³⁷ but it does not suggest when, specifically, this happens. The AIA/AISC white paper nevertheless provides a desperately needed starting point at getting to the bottom of design delegation and design-assist.

II. Design Liability Creep: Evaluation of Design-Assist and Design Delegation Risks that Threaten Project Participants

A. Ambiguities Facilitate “Design Liability Creep”¹³⁸

Shifting design liability remains a concern for project participants in both design-assist and design delegation.¹³⁹ Liability in these two contexts turns on the parties’ intent. In design delegation, it is often the intent of all parties that design liability will transfer.¹⁴⁰ By contrast, in the context of design-assist, project liability is more likely to shift inadvertently and unintentionally because the parties (some or all) do not expect liability transfers as a part of design-assist.¹⁴¹ As far as design delegation is concerned, unexpected bouts of liability are certainly still possible but may not carry the same aspect of surprise, considering the parties likely expected at least some liability to transfer as a part of the design delegation dynamic.¹⁴²

Though the question of who is responsible for which aspects of the design should be straightforward, it is in fact plagued by uncertainty, and such uncertainty is a source for conflict.¹⁴³ Much of this conflict increases as the complexity of the project increases. With increased complexity, “[c]omplications can arise due to misunderstandings of the various roles and responsibilities or as a result of oversights in allocating responsibility in the contract or in the preparation of the contract documents.”¹⁴⁴ As a result, parties often dispute who should be responsible for certain aspects of the design and to what extent.¹⁴⁵

The uncertainties surrounding design-assist and design delegation cloud parties’ expectations and understandings of their respective scopes of work. These ambiguities range from misunderstanding which phases of the project the contractor will be involved in, to inadvertent assumption of design liability. Lack of clarity surrounding design liability is exacerbated in the design-assist and design delegation contexts. This is at least partly attributable to the fact that design-assist and design delegation are not active in the DBB delivery model. Relative to the DBB model, liability and responsibility concepts have been solidified in extensive bodies of case law, such as the *Spearin* Doctrine, that protect contractors from design liability. Unlike the DBB model, design-assist and design delegation do not foster clear boundaries and clear successions of work—they intertwine project processes that are separated in the DBB model. As such, the efficacy of *Spearin* remains unclear as pertains to contractor protections in the design-assist and design delegation contexts.¹⁴⁶

B. Design Liability Shift: Different Implications for Different Participants

Shifting design liability impacts owners, design-professionals, and design-assist contractors.¹⁴⁷ Though no project participant can be entirely insulated from this risk, the liabilities associated with design liability creep will impact different participants, differently.

1. Owners

Owners have the most to gain by using collaborative design and the least amount of exposure from the ambiguities surrounding it. Nonetheless, not even owners are immune from the risks associated with design-assist and design delegation ambiguities. One ambiguity that impacts owners is the design-assist uncertainty concerning which parts of the project a contractor is being hired to participate in.¹⁴⁸ Owners need to be clear about whether selection for design-assist services coincides with selection for project construction. The ambiguity regarding this issue could hamstring owners financially and temporally. If design-assist selection does not guarantee construction selection, then owners must be sure to include a provision in the design-assist contract that gives the owner the right to use the design-assist contractor's plans and drawings developed as part of the design-assist work. As seen in *AdvanceTEC*, a subcontractor scorned may not be eager to turn over their hard work once they find out that they will not be performing project construction.

There is also a concern that if owners select design-assist partners that will also be constructing the project, there is less room for competition to yield the lowest prices because contractors will be selected before firm prices are obtained. If owners determine that design-assist participation does include construction selection, owners should use benchmark prices throughout the programming to ensure proposed prices are shoring up to market prices. Even before this, during contractor selection, owners can utilize nonbinding preliminary bids based on initial plans, with binding final prices to be submitted upon completion of the plans. Of course, this exposes the owner to the risk of changing prices as designs develop, but it may nonetheless incentivize the contractors to remain cost-efficient for fear of not getting the job.¹⁴⁹

2. Design Professionals

For design professionals, “a proper delegation of design responsibility begins with the initial engagement on the project and the determination of the scope of services on the project, continues with the drafting of specifications, and ends with a review of shop drawings.”¹⁵⁰ Considering the prevalence of ambiguity surrounding scopes of work in the design-assist and design delegation processes, it is to be expected that both design-assist and design delegation threaten design professionals with increased design liability exposure.¹⁵¹ The main areas of risk are the ConsensusDocs' strict allocation of liability, potential liability for designs of another, and potential inapplicability of the economic loss rule when providing preliminary designs.

First, specific to design-assist, CD 541 Addendum allocates to the design professional responsibility for all aspects of the design.¹⁵² This is despite CD 541 Addendum's recognition that design-assist takes a considerable amount of design collaboration, and the fact that this increased collaboration has been flagged by some as the hotbed for design liability conflict.¹⁵³ CD 541 Addendum states, in section 2.3, that “while retaining overall responsibility for the project design, Design Professional shall work collaboratively with other members of the project team drawing on the respective expertise in order to achieve the project objectives.”¹⁵⁴ This same liability is present in CD 200, regarding design delegation. In CD 200, contractors are given responsibility for broad aspects of the project, including construction of the project in accordance with design specifications. Under CD 200, section 3.15 permits the use of design delegation subject to certain parameters. Moreover, while AIA contracts provide suggested standard services for design professionals, “[t]his terminology does not provide the parties with a full appreciation for the services that will be performed by the structural engineer on the project.”¹⁵⁵

To some extent, this maxim of designer responsibility for designs carries over from traditional delivery methods. Policy considerations underpin a designer's responsibility for their designs.¹⁵⁶ The public policy underlying design professional liability rests on the fact that designers are often creating structures that will inevitably be encountered by the public, and because designers often consult during the construction phase, “the design professional must expect to be held accountable to all those [that] come in contact with his work.”¹⁵⁷ Unfortunately for design professionals involved in design-assist, more designers means more potential exposure.¹⁵⁸ While traditional project delivery models hold the design professional liable based on the

design professional's contributions, design-assist may hold a design professional liable based on a third-party contractor's acts or omissions.

Second, based on principles illustrated in long-standing case law, design professionals may have a hard time shirking design responsibility, even when the design defect is potentially attributable to another. In the famous 1988 case, *Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors*,¹⁵⁹ the Missouri Court of Appeals illustrated this point.¹⁶⁰ In *Duncan*, Gillum-Colaco, Inc. ("GCE") agreed to perform engineering services for the design and construction of a Hyatt Regency Hotel.¹⁶¹ GCE assumed all responsibility for the structural engineering services.¹⁶² GCE was a member of the project's design team, which also included the project architect and mechanical and electrical engineers.¹⁶³ Daniel Duncan ("Duncan"), a design professional, was under the direct supervision of GCE, and was also the engineer in charge of all structural engineering work on the project.¹⁶⁴

Construction of relevant portions of the project included steel connections. Some of the steel connection designs were simpler than others and could be determined by reference to industry manuals. The court noted that these simpler connections "can be done by a steel fabricator utilizing non-engineering personnel."¹⁶⁵ Other connections were more complex and required engineering expertise to design.¹⁶⁶ The court also noted that Havens Steel Company ("Havens"), the project's steel fabricator, had in-house engineers that were capable of designing all connections based on information communicated from Duncan.¹⁶⁷ Duncan also testified that he intended for Havens to design the connections. Even still, the court noted that "the adequacy of the connection design remain[ed] the responsibility of the structural engineer."¹⁶⁸

After project completion, a walkway collapsed and killed 114 people and injured 186 others.¹⁶⁹ The engineers had their licenses revoked by a professional board-appointed commission, which the lower courts affirmed. On appeal, the court explained that Duncan did not include in his structural designs the need for special welds, stiffeners, or other technical aspects of connections on the project. Duncan explained it was his intent and belief that Havens would be designing the connections. In turn, Havens stated it was its belief that Duncan would be designing these connections. Duncan and his supervisor tried to shift responsibility onto Havens.

The court rejected this attempt and found that both Duncan, his supervisor, and GCE were guilty of gross negligence for the defective design. The court explained that "[the public policy of the state] imposes on an engineer a non-delegable duty of responsibility for projects to which he affixes his seal."¹⁷⁰ Refusing to shift blame to Havens, the court explained "[a]n engineer affixing his seal to plans is personally and professionally responsible therefore."¹⁷¹

Duncan should put design professionals on notice as they enter the design-assist and design delegation realms—even though parts of the design may be delegated to contractors, the design professional may nonetheless remain responsible for the adequacy of the project designs in their scope. The design professional must be careful to have a good working relationship with other members of the design team to ensure all design elements are appropriately cared for. Moreover, *Duncan* teaches design professionals to use their seal selectively. A good rule of thumb for design professionals on design-assist projects: only seal it if you are willing to stand by it.

Finally, design professionals should be aware of other cases that impose liability for merely economic loss before entering into a binding contract. In *Bilt-Rite Contractors, Inc. v. The Architectural Studio*,¹⁷² the Supreme Court of Pennsylvania evaluated "whether, as a matter of law, an architect ... who prepares and develops design drawings and specifications, owes a duty to the contractors who apply those specifications in the situation where no contractual relationship exists."¹⁷³ In *Bilt-Rite*, a general contractor brought a negligent misrepresentation action against an architect based on alleged misrepresentations in the plans and specifications the contractor relied on when submitting its bid.¹⁷⁴ When project costs exceeded predictions, the builder sued the engineer for damages.¹⁷⁵ The engineer asserted the economic loss rule as a defense and argued that, because the parties were not

in privity of contract, the builder could not pursue merely economic damages.¹⁷⁶ The court rejected this argument and adopted a provision from the Second Restatement of Torts allowing recovery for merely economic loss. The court stated that this applies,

in cases where information is negligently supplied by one in the business of supplying information, such as an architect or design professional, and where it is foreseeable that the information will be used and relied upon by third persons, even if the third parties have no direct contractual relationship with the supplier of information.¹⁷⁷

Jurisdictions are split on whether the economic loss rule bars purely pecuniary recovery in cases like that of *Bilt-Rite*.¹⁷⁸ Nonetheless, when considered in the collaborative design context, design professionals should be aware of what their documents will be used for and by whom; this is especially true considering the preliminary nature of information circulated in the design-assist phase, where the design professional may not have the best gauge of the project's specific needs. Ambiguities in design collaboration responsibilities may also muddy the role of the design professional, leading to further exposure from a contractor arguing it was entitled to rely on designs that later played out to be inaccurate. Of particular concern for design professionals, some standard form contracts, such as CD 200 and AIA documents, might provide contractors valid footing to take these positions to the extent the contracts absolve contractors of design liability and/or leave room for interpretation as to what the design professional's scope of services included.¹⁷⁹

3. Design-Assist and Design Delegation Contractors

Contractors participating in design collaboration (be it design-assist or design delegation) may have the most exposure resulting from design-assist and design delegation ambiguities. As these collaborative design methods continue to grow in popularity, contractors need to be hyperaware of what they are being asked to do.

First and foremost, contractors need to know when they are being asked to take on design responsibility, as opposed to merely providing design input. Assumptions of design responsibility will not always be obvious, but they will almost always be risky. The first risk concerns the legality of the activity. Many states classify as criminal activity the unlicensed practice of professional design. Emblematic of many states with similar laws, Colorado's statute provides:

Any person who practices or offers or attempts to practice professional engineering without an active license under this [statute] commits a class 2 misdemeanor and shall be punished as provided in [criminal statutes], for the first offense, and, for the second or any subsequent offense, the person commits a class 6 felony and shall be punished as provided in [criminal statutes].¹⁸⁰

If caught violating one of these criminal licensure statutes, contractual obligations may be the least of a contractor's worries. The ASA warns of the increased prevalence of these risks, stating: “[a]rchitects, engineers and their firms increasingly ignore their professional responsibility attempting to pass on portions of their work to contractors, subcontractors and suppliers.”¹⁸¹ Architects and engineers may take protective steps of their own, and these steps can result in the passing of design liability to a contractor. By way of example, published advice to engineers navigating design delegation risks uses the example of a project that includes stairs and advises design professionals that “a design delegation that states that the stair contractor is responsible for the final design of the stairs in a manner consistent with ... manufacturer's base design would be an effective delegation of the design.”¹⁸²

For contractors, some of the most dangerous risks are those that insurance will not cover, and design-assist and design delegation leave room for many of these possibilities. Most CGL policies will not cover damages resulting from the contractor's performance of professional duties or services.¹⁸³ Some contractors are learning this the hard way. In *Witkin Design Group, Inc. v. Travelers Property Casualty Co.*,¹⁸⁴ a developer hired Witkin to design and build an intersection.¹⁸⁵ Note that Witkin was

not the engineer of record.¹⁸⁶ A traffic accident occurred at the intersection and killed an 11-year-old boy.¹⁸⁷ The decedent's estate brought a wrongful death action against multiple defendants, including Witkin.¹⁸⁸ Witkin sought to have its insurance company, Travelers, defend or indemnify the claim.¹⁸⁹ With Travelers, Witkin had a CGL policy and an umbrella policy to cover excess.¹⁹⁰ On par with the average CGL policy, Witkin's policy contained a professional services exclusion for any "bodily injury or property damage arising out of the rendering of or failure to render any professional services."¹⁹¹ The policy defined "professional services" as "any service requiring any specialized skill or training."¹⁹²

Citing the professional services exclusion, Travelers refused to defend or indemnify the suit.¹⁹³ A lower court determined that the design and construction of an intersection constituted professional services under the CGL policy.¹⁹⁴ On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the magistrate judge's ruling.¹⁹⁵ The court treated the issue of whether design and construction of the intersection constituted a professional service as one of contract interpretation.¹⁹⁶ The Court cited the policy's definition of "professional services" and also noted the policy's all-encompassing examples of professional services including arguably basic activities, such as,

preparation, approval, provision of or failure to prepare, approve, or provide any map, shop drawing, opinion, report, survey, field order, change order, design, drawing, specification, recommendation, warning, permit application, payment request, manual or inspection.¹⁹⁷

The examples also included performance, approval, and supervision of the more traditional professional services such as architecture and engineering.¹⁹⁸ However, this same category included activities such as performance and/or supervision of job site safety, construction contracting, construction administration, construction management, and selection of contractors and subcontractors.¹⁹⁹ Finally, one catch-all category included "[m]onitoring, testing, or sampling service necessary to perform any of the services included [in the above-mentioned categories]."²⁰⁰

Contractors should learn from *Witkin* and cases just like it. As made clear by the CGL policy at issue in *Witkin*, "professional services" for the purposes of insurance coverage are often not limited to the "traditionally" recognized professional services that require professional licenses, such as architecture and engineering. Depending on the insurance policy, professional services might even include what some would consider basic construction functions, like job site safety and construction management.²⁰¹ If these activities are included in a contractor's CGL policy's definition of "professional services," there is a chance they may be excluded from coverage from activities commonly delegated to contractors.

III. Practical Considerations and Practice Pointers to Effectively Manage Design-Assist and Design Delegation Risks

Ambiguity in contract language is not an issue that is unique to collaborative design projects. However, the use of non-standard terms as if they had a standard, accepted meaning has highlighted one of the areas that contractors and designers have resisted for years: the effective and detailed delineation of scopes of services to be performed by each in connection with the development and finalization of construction documents. To eliminate ambiguities, a thorough vetting of the anticipated design-assist or design delegation processes should be pursued. This vetting process should include steps to be completed by each participant and the development of a responsibility/liability matrix, as the outcome of contract negotiations and drafting sessions with the parties involved, their lawyers, their insurance professionals and carriers, and their project team (who presumably will be called upon to fulfill the design-like responsibilities).

A checklist follows. Though this checklist is by no means comprehensive, here are a few important considerations for every project with shared or delegated design responsibilities:

- Clearly delineate the project participants' scopes of work with specific inclusions and exclusions. As articulated at length above, parties cannot assume that the term design-assist has a distinctive legal meaning apart from delegated design. The precise scope of design services being agreed to should be stated clearly in the contract documents. As a boots and suspenders approach, any limitations and exclusions on the design services being provided should also be clearly stated in the contract documents.
- Address specifically, and in an item-by-item format, the design responsibility and liability regarding each of the scope of work items included in the design-assist or design delegation scopes of work. They must be detailed and should leave no doubt as to whom the liability attaches. This is where a responsibility/liability matrix comes in handy.
- Outline the manner in which each scope of work item of design-assist or design delegation work will be performed, including the specific methods to be employed, the degrees of certainty or levels of development expected for each service, and all design and performance criteria that is applicable to the work, documenting each participant's understanding as to the undertakings regarding the design and performance criteria.
- Verify the common law of the jurisdiction in which the project is located and the degree to which the designer of record may (or may not) contractually transfer its responsibility for the design to other third parties.
- Consider limiting the assignment of design responsibility to other downstream parties in the contractual chain. It is one thing to agree to share design liability with a party in privity that has been vetted and approved to perform design services—it is quite another to unknowingly assume shared risk with an undisclosed party.
- Utilize indemnity provisions to shift the costs of design errors and omissions to the party whose actions or inactions played a role in creating such costs.
- Clarify whether the design-assist subcontractor is expected to participate in the project's construction phase. If not, the owner should be sure to include in the contract that the owner will have the rights to the design-assist subcontractor's work product after the design-assist phase ends. If design-assist participation will include construction selection, owners should use benchmark prices throughout the programming to ensure bid prices are supported by market prices.
- Review insurance agreements to ensure contractual obligations match up with coverage. Each project participant should evaluate what the design-assist contract is asking them to do. Then, determine whether these activities are covered by their insurance policy. If they are not, either edit the scopes of design work, or look into endorsement options to fill gaps in coverage. Owners may also want to look into wrap-up policies to avoid coverage gaps.
- Tie insurance policy endorsements to the applicable professional statutes and regulations governing the provision of design services in the state where work is being performed.
- Consider the benefits of making the owner-designer contract and the owner-contractor agreements congruent in their coverage regarding the design responsibilities of each party.
- Specifically assign “sealing” responsibility regarding the designs for any of the items included in the scope of design-assist and design delegation work.
- Performance criteria is a special problem. Specifying clearly who is responsible for the adequacy of the criteria themselves and separating the flaws in the criteria from the flaws in the design information developed ultimately to fulfill the criteria can be very difficult. As with the above items, specifics are necessary in both the contract terms/scopes of work, as well as in the related insurance policies.

IV. Conclusion

While certain standard form agreements, white papers, state statutes and local codes, and other commentators have provided a much-needed starting point for parties involved on design-assist or design delegation projects, there is no silver bullet to the various issues discussed above. Each party providing input in the design must assess their risk tolerance at the outset and communicate the boundaries of their involvement in the project design through carefully drafted contract language. Additionally, parties should ensure adequate insurance coverage is in place to cover the risks inherent with providing professional services, even when they are only providing limited design services on the project. Creativity and ingenuity will be key, as it's unlikely that a one-size-fits-all approach will squarely address all the legal risks created in a shared design project framework. Ultimately, the details matter, and the more time parties are willing to spend at the beginning of the project to address and allocate design responsibility and risks, the better position parties will be in to avoid or resolve disputes that arise during the project.

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Footnotes

- * Joel D. Heusinger is a partner at Woods | Aitken LLP, where he has built a robust construction law practice representing contractors, subcontractors, owners, sureties, and design professionals. Joel is actively involved in numerous professional organizations, including involvement as a member of the American Bar Association Forum Committee on the Construction Industry and the Section on Public Contract Law, where he was Chairman of the Construction Contract Committee from 1995–1998. Joel is also a Fellow in the American College of Construction Lawyers and has been named Who's Who in Construction Law every year since 2005. Joel also teaches Construction Practice at University of Nebraska College of Law.
- 1 [Philip L. Bruner & Patrick J. O'Connor, 2A Bruner And O'Connor On Construction Law § 6:19 \(Aug. 2021 update\).](#)
- 2 *See generally* Am. Inst. Architects & Am. Inst. Steel Constr., Design Collaboration on Construction Projects: Delegated Design, Design Assist, and Informal Involvement—what does it all mean? (last visited Oct. 4, 2021) [hereinafter AIA & AISC White Paper]; ConsensusDocs, ConsensusDocs Guidebook and Sample Responsibility Matrix: ConsensusDocs 541—Addendum to Agreements Between Owner and Construction Manager and Between Owner and Design Professional for Design-Assist Service (May 2019) [hereinafter CD 541 Guidebook]; ConsensusDocs 541 Design-Assist Addendum (2019) [hereinafter CD 541 Addendum].
- 3 This discussion is subject to the caveat that there remains no standardized, or widely adopted industry definition of “design-assist.”
- 4 *See infra* notes 7–134 and accompanying text.
- 5 *See infra* notes 135–198 and accompanying text.
- 6 *See infra* § IV.
- 7 AIA & AISC White Paper, *supra* note 2, at 4.
- 8 *Id.*
- 9 *Id.* at 5.
- 10 Brian Perlberg, An Assist with Design-Assist and Lean Construction: Closing Design Gaps Through Collaboration 2 (2019), https://model.victorinsuranceus.com/uploadedFiles/Content/Risk_Management/Risk_Management/News_and_Events/InvitedAttorneysMeeting/2019-58thProceedings/Assist%20with%20Design-Assist%20and%20Lean%20Construction.pdf; *see* CD 541Guidebook, *supra* note 2, at 3 (“Design-assist is loosely defined in the industry as a process by which the constructors collaborate with the project owner and the design

professionals beginning in the design development phase to assist all parties in meeting the Project's objectives.”).

- 11 Some publications disagree with the characterization of design-assist as a procurement method, instead advocating it be considered a technique to be used as a part of various procurement methods. *See* AIA & AISC White Paper, *supra* note 2, at 3 n.3. Contrast this position with another AIA-affiliated source that states, “[d]esign assist (DA) is a *procurement method* ...” Bldg. Team, *Design-assist: The way to really fly [AIA Course]*, Bldg. Design + Constr. (July 12, 2016), <https://www.bdcnetwork.com/design-assist-way-really-fly-aia-course> (emphasis added). Still other sources posit that “[t]he design-assist process generally is not considered a project delivery approach, but rather a process that can be employed to better deliver design and construction services in any number of delivery models.” Bruner & O'Connor, *supra* note 1, at § 6:18. Some contradict “technique” advocates with proposed definitions like this: “Design-assist is a *project delivery method* in which the construction team is engaged by the owner to collaborate with the architect or engineer during the design phase.” Tom Garske et al., *Design Assist 3* (Nov. 5, 2015), https://issuu.com/nbbj/docs/design_assist_white_paper. A more in-depth analysis of whether design-assist can and/or should be considered a procurement method is beyond the scope of this Article, other than the acknowledgement that this disagreement typifies the uncertain position of design-assist in the construction industry.
- 12 *See, e.g., Utah Admin. Code R 131-4-501* (West 2021) (referring to the contractor performing the design-assist services as the “design assist contractor”); Superior Ct. Cal., *Design Assist Agreement for Preconstruction and Construction Services* § 1.1.23, <https://www.courts.ca.gov/documents/solanocourthouse-rfq-attacha.pdf> (last visited Oct. 6, 2021) (defining “Design Assist Contractor” as “the Contractor selected to develop and refine construction documents ...”); Ventana Ventures, *Design Assist Services*, <https://ventanaventures.io/design-assist-services> (last visited Oct. 6, 2021) (advertising design-assist services, and referring to the firm as a “Design Assist Contractor (DAC)”).
- 13 Garske et al., *supra* note 11, at 2.
- 14 Bryan W. Franz, et al., *Project Impacts of Specialty Mechanical Contractor Design Involvement in the Health Care Industry*, 139 J. Constr. Eng'g & Mgmt. 1091, 1094 (2013) (“In typical design-assist arrangements, the range of specialty contractor services can be broad, from preconstruction estimating to directly supporting the design team.”); Bruner & O'Connor, *supra* note 1, at § 6:19 (“There are any number of ways that a designer might be assisted by the construction trades or others in achieving the design professional's responsibilities.”).
- 15 Joel D. Heusinger, *Ambiguity Breeds Conflict: The Importance of Defining “Design-Assist” in the Construction Industry*, 11 J. Am. Coll. Constr. Laws. 4 (2017).
- 16 *Id.*
- 17 AIA & AISC White Paper, *supra* note 2, at 8. Contrast this with delegated design, where contractors often must hire their own design professionals to perform the work requested to avoid performing design work without a license. *Id.*
- 18 *Id.* Contrast this with design-assist, where the contractor often supplies information to the design professional based on the contractor's experience and expertise. *Id.*
- 19 *Delegated Design: More Risk, Less Certainty*, Jordan Ramis (Feb. 28, 2018), <https://jordanramis.com/article/delegated-design—more-risk-less-certainty/>.
- 20 Joseph M. Leone & Brian Perlberg, *How Design-Assist Moves the Needle on Collaboration and How it Differs from Design-Build and IPD*, Design Cost Data (Jan. 3, 2020), <https://www.dcd.com/articles/how-design-assist-moves-the-needle-on-collaboration-and-how-it-differs-from-design-build-and-ipd>.
- 21 *Id.*

- 22 John Wheaton, *The Professional Services Perspective: Delegated Design and Engineering*, Glass Mag. (Mar. 4, 2019), <https://www.glassmagazine.com/blog/2019/professional-services-perspective-delegated-design-and-engineering>.
- 23 See, e.g., Precast/Prestressed Concrete Inst., Architectural Precaster's Design Assist Role 2 (2012), <http://www.universalconcrete.com/Design/Designers-Notebook/DN-26-Design-Assist.pdf> [hereinafter Precaster's Design Assist Role] (discussing design-assist specific to precast concrete, noting that an important part of the precaster's design-assist role includes review of preliminary designs to “present the key options and communicate benefits that would have a significant effect upon the appearance, function, and cost of the project”).
- 24 AIA & AISC White Paper, *supra* note 2, at 8.
- 25 Bruner & O'Connor, *supra* note 1, at § 6:18.
- 26 Elizabeth Manning, *Understanding the Difference Between Design-Assist & Delegated Design*, Constr. Bus. Owner (Nov. 17, 2020), <https://www.constructionbusinessowner.com/strategy/understanding-difference-between-design-assist-delegated-design>.
- 27 *Id.*
- 28 For a discussion of state licensure laws related to design delegation and design-assist, *see infra* § II.B.3.
- 29 *Id.*
- 30 AIA & AISC White Paper, *supra* note 2, at 10.
- 31 *Id.*
- 32 *Id.* at 6 (noting, “Design Assist is not a delegation of design responsibility. While the design professional can use contractor-provided information to inform its design, the design professional maintains control over all aspects of the preparation of the construction documents, including the responsibility to integrate contractor-provided information into the design and identify and resolve design conflicts.”).
- 33 For a more complete discussion of design-assist and project phasing, *see generally* Heusinger, *supra* note 15.
- 34 See Keith R. Molenaar & Robert M. Leicht, *Study Shows Importance of Team Integration*, DBIA.org (Aug. 17, 2015), <https://dbia.org/study-shows-importance-of-team-integration/> (suggesting relative to use of design-assist on the design-build delivery model, early involvement of design-assist participants is essential to successful integrated project delivery). *But see* Bruner & O'Connor, *supra* note 1, at § 6:18 (highlighting an industry inconsistency, noting some contemplate the design-assist process at all phases throughout the construction project).
- 35 AIA & AISC White Paper, *supra* note 2, at 10.
- 36 *Design*, Dictionary.com, <https://www.dictionary.com/browse/design> (last visited Oct. 28, 2021).
- 37 *Assist*, Dictionary.com, <https://www.dictionary.com/browse/assist> (last visited Oct. 28, 2021).
- 38 *Delegate*, Dictionary.com, <https://www.dictionary.com/browse/delegate> (last visited Oct. 28, 2021).
- 39 Leone & Perlberg, *supra* note 20, at S-3.
- 40 Gregory H. Chertoff & Navid Ansari, *Design Delegation—Legal Definitions and Practical Effects*, Peckar & Abramson, PC, <https://www.agc.org/sites/default/files/pdf/Handout%20on%20Delegated%20Design.pdf> (last visited Oct. 29, 2021).

- 41 See, e.g., Complaint and Jury Demand at ¶ 44, *W.J. O'NEIL COMPANY, Plaintiff, v. SHEPLEY, BULFINCH, RICHARDSON & ABBOTT, INC., and Smith Seckman Reid, Inc., Defendants*, 2011 WL 7109616 (E.D. Mich. 2011) (No. 1) (“This extraordinary design assist process was not contemplated by any of the interested parties on the Project and *not included in the original contract, specifications, or schedule.*”) (emphasis added).
- 42 *Id.*
- 43 See *infra* § II.B.3.
- 44 Precaster's Design Assist Role, *supra* note 23, at 2 (“In recent years, a trend toward early integration of the design/build process has developed into what is now called design assist.”).
- 45 Manning, *supra* note 26 (cautioning that design-assist and design build sound similar, but there are real differences between them).
- 46 Gregory R. Andre, *Design-Assist: Getting Contractors Involved Early*, K&L Gates (Sept. 19, 2012), https://files.klgates.com/files/publication/055ae3ba-ecb7-43d0-be9b-412fb235407b/presentation/publicationattachment/e4e0432e-8ae0-4656-824e-48d6a7619d36/design-assist-getting-contractors-involved-early_091912.pdf.
- 47 Bruner & O'Connor, *supra* note 1, at § 6:20.
- 48 See generally *AdvanceTEC, L.L.C. v. Wohlsen Construction Company*, 2017 WL 1904255, *2 (E.D. Va. 2017) (noting the general contractor and design-assist subcontractor disagreed as to whether the general contractor's use of the design-assist work product was contingent on the subcontractor's selection for project construction).
- 49 Gregory H. Chertoff & Levi W. Barrett, *Design Delegation—Practical Considerations and the Need for Clarity*, ConsensusDocs (Mar. 28, 2019), <https://www.consensusdocs.org/design-delegation-practical-considerations-and-the-need-for-clarity/>.
- 50 Bruner & O'Connor, *supra* note 1, at § 6:46.
- 51 Leone & Perlberg, *supra* note 20.
- 52 The “design-assist” search term also produced three trial court orders, and only one jury verdict/settlement.
- 53 *Ric-Man Construction, Inc. v. Pioneer Special Risk Insurance Services, Inc.*, 522 F. Supp. 3d 255 (E.D. Mich. 2021) (mentioning design assist three times: the first and second times noting that “professional services” was defined as “construction management, program management, project management, owner's representation and any design delegated responsibility or design assist performed by the Insured”; the third time noting that the complaint alleged defective performance as to both the project management and the “design delegated responsibility or design assist”); *Berkley Assurance Company v. Hunt Construction Group, Inc.*, 465 F. Supp. 3d 370, 375 (S.D. N.Y. 2020), appeal withdrawn, 2021 WL 2451710 (2d Cir. 2021) (mentioning design-assist one time, in passing to note that one party alleged the other party failed to perform its design assist obligations); *Aerotek, Inc. v. Boyd*, 629 S.W.3d 249 (Tex. App. Dallas 2019), review granted, (Dec. 11, 2020) and judgment rev'd, 624 S.W.3d 199, 2021 Fair Empl. Prac. Cas. (BNA) 199218, 171 Lab. Cas. (CCH) P 62126 (Tex. 2021) (mentioning design-assist only once to note that one of the parties specialized in “design assist”); *Shehan v. Turner Construction Company*, 2019 WL 1320046, *1–2 (E.D. Ky. 2019) (mentioning design-assist twice: the first time, noting one party agreed to provide “design/build and design/assist” services; the second time, noting the parties terminated the “design/build - design/assist” contract); *Fleming Steel Co. v. Jacobs Engineering Group, Inc.*, 373 F. Supp. 3d 567, 574 (W.D. Pa. 2019) (mentioning design-assist once to explain that one party hired another for “design-assist type conceptual work ...”); *Arch-Con Corporation v. Archcon Architecture, Limited*, 2019 WL 422662, *1 (W.D. Tex. 2019) (mentioning design-assist once to note that the plaintiff provided “design-assist” services,

which included performing construction and working with clients' architects to "assist with pre-construction preparation such as budget, scheduling, and certain aspects of the design"); *AdvanceTEC, L.L.C. v. Wohlsein Construction Company*, 2017 WL 1904255 (E.D. Va. 2017) (mentioning design-assist a total of six times, each time either quoting the parties' contract, or noting that the parties disputed the scope of work); *W.J. O'Neil Co. v. Bulfinch*, 2016 WL 4158380, *7, 8 (E.D. Mich. 2016), decision aff'd, 700 Fed. Appx. 484 (6th Cir. 2017) (mentioning design-assist only twice, each time merely mentioning the plaintiff's allegation that the defendant failed to "adequately participate in the design assist process"); *Schram Construction, Inc. v. Regents of University of California*, 187 Cal. App. 4th 1040, 114 Cal. Rptr. 3d 680, 683, 259 Ed. Law Rep. 194 (1st Dist. 2010), as modified on denial of reh'g, (Sept. 22, 2010) (mentioning design-assist once, noting the parties executed a subcontract for "design-assist preconstruction services"); *U.S. ex rel. E & H Steel Corp. v. C. Pyramid Enterprises, Inc.*, 509 F.3d 184, 190 (3d Cir. 2007) (noting one of the parties "performed some 'design-assist engineering'").

54 *Williams v. Lockheed Martin Corp.*, 2011 WL 2200631, *10 (S.D. Cal. 2011) (listing both "design," and "assist" next to each other as separate items of a list); *BladeRoom Group Limited v. Facebook, Inc.*, 219 F. Supp. 3d 984, 994 (N.D. Cal. 2017) (noting evaluation of certain *designs* did not *assist* in determining an issue) (emphasis added); *CG Schmidt Inc. v. Permasteelisa North America*, 142 F. Supp. 3d 755, 761, 87 U.C.C. Rep. Serv. 2d 1184 (E.D. Wis. 2015), aff'd, 825 F.3d 801, 89 U.C.C. Rep. Serv. 2d 1141 (7th Cir. 2016) (referring to "design assist" in the products liability context); *Macauley v. Harris Corp.*, 1991 WL 53655, *1 (E.D. Pa. 1991) (explaining that a party *assisted* in placing a product in the stream of commerce by developing the *design*) (emphasis added).

55 *See supra*, note 54.

56 *See, e.g.*, Complaint and Jury Demand at ¶ 46, *W.J. O'NEIL COMPANY, Plaintiff, v. SHEPLEY, BULFINCH, RICHARDSON & ABBOTT, INC., and Smith Seckman Reid, Inc., Defendants*, 2011 WL 7109616 (E.D. Mich. 2011) (noting in the complaint that design-assist on the relevant project "entailed a redesign and coordination of the above-ceiling spaces involving representatives of the Defendants ... and other interested contractors").

57 *See supra*, note 56.

58 John P. Ahlers, *Design-Assist, an Ambiguous Term Causing Conflict in the Construction Industry*, Ahlers Cressman & Slate (Oct. 31, 2019) ("[T]he term 'design-assist' is notably absent from court opinions and most state licensing laws.").

59 *General Bldg. Contractors of New York State, Inc. v. New York State Educ. Dept. Bd. of Regents of University of State*, 175 Misc. 2d 922, 670 N.Y.S.2d 697 (Sup 1997) (mentioning "delegated design" only one time to evaluate the propriety of an administrative rule that exempted from the definition of "unprofessional conduct" the delegation of design work between design professionals); *id.* (using "design delegation" six times throughout relative to the language in the parties' contract, and to discuss whether design delegation constitutes the unlicensed practice of engineering); *Metromont Corporation v. Allan Myers, L.P.*, 2021 WL 1733474, *8 (D. Md. 2021) (mentioning "delegated design" only once in the text without actually referring to the concept); *Id.* at *2–*3 (referring to "design delegation" as necessary to describe expert testimony); *Delaware State University v. Thomas Company, Inc.*, 2020 WL 6799605, *25–26, 48 (D. Del. 2020) (referring to "delegated design" five times in the text: once noting a party's argument that there is no standard of care regarding delegated design, and the other times noting the parties disputed whether certain project elements were part of a "delegated design"); *Kinsley Construction, Inc. v. Kroger Co.*, 2016 WL 5345860, *2, 4 (E.D. Pa. 2016) (mentioning "delegated design" three times: first to list a heading that appeared in the parties' contract, and second to quote a correspondence from one party to another); *Funk v. Northrup Grumman Corp.*, 2010 WL 11601066, *4 (C.D. Cal. 2010) (using the terms "delegated" and "design" next to each other without actually referring to "delegated design"); *Scott v. Universal Fidelity Corp.*, 1999 WL 684122, *5 (N.D. Ill. 1999) (using the terms "delegated" and "design" next to each other without actually referring to "delegated design"); *Martin K. Eby Const. Co., Inc. v. Jacobs*

Civil, Inc., 2006 WL 1881359, *8 n.11 (M.D. Fla. 2006) (using the terms “delegated” and “design” next to each other without actually referring to “delegated design”); *Baum v. U.S.*, 765 F. Supp. 268, 273 (D. Md. 1991), judgment aff’d, 986 F.2d 716 (4th Cir. 1993) (using the terms “design” and “delegation” next to each other without actually referring to the concept of “design delegation”); *Arkansas Rice Growers Co-op. Ass’n v. Alchemy Industries, Inc.*, 797 F.2d 565, 568 (8th Cir. 1986) (using the term “design delegation” only once, holding the designer could not be held liable for damages where the designer delegated to a third party responsibility to ensure certain equipment did not damage the facility, and the owners had approved this delegation of responsibility).

60 *See* *Metromont Corporation v. Allan Myers, L.P.*, 2021 WL 1733474, *8 (D. Md. 2021) (mentioning “delegated design” only once in the text without actually referring to the concept). *See* *Funk v. Northrup Grumman Corp.*, 2010 WL 11601066, *4 (C.D. Cal. 2010) (using the terms “delegated” and “design” next to each other without actually referring to “delegated design”); *Scott v. Universal Fidelity Corp.*, 1999 WL 684122, *5 (N.D. Ill. 1999) (using the terms “delegated” and “design” next to each other without actually referring to “delegated design”); *Martin K. Eby Const. Co., Inc. v. Jacobs Civil, Inc.*, 2006 WL 1881359, *8 n.11 (M.D. Fla. 2006) (using the terms “delegated” and “design” next to each other without actually referring to “delegated design”); *Baum*, 765 F. Supp. at 273 (using the terms “design” and “delegation” next to each other without actually referring to the concept of “design delegation”).

61 *See, e.g., Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co.*, 472 Mass. 549, 36 N.E.3d 505, 514 (2015) (noting the amount of reliance a contractor can place on designs may vary based on the contractor's level of participation in the design phase).

62 *Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co.*, 472 Mass. 549, 36 N.E.3d 505 (2015).

63 *Coghlin*, 36 N.E.3d at 514.

64 *See, e.g., Witkin Design Group, Inc. v. Travelers Property Casualty Company of America*, 712 Fed. Appx. 894, 895 (11th Cir. 2017) (unpublished decision) (noting the insurer did not have to indemnify or defend the contractor because the contractor's work in question constituted “professional service” under the policy's professional services exclusion); Amanda Kolson Hurley, *Trust Me, I'm an (Unlicensed) Architect*, J. of the Am. Inst. of Architects (Sept. 10, 2009), https://www.architectmagazine.com/practice/trust-me-im-an-unlicensed-architect_o (telling the story of James Madison Jackson, who spent two years in a Texas state prison for the “gateway crime” of the unlicensed practice of architecture).

65 *See Engineering Licensing Compliance Guide*, Harbor Compliance (Jan. 6, 2016), <https://www.harborcompliance.com/information/engineer-license-requirements-registration> (providing a 50-state survey of each state's requirements and regulations on the practice of engineering).

66 Hurley, *supra* note 64 (emphasis added).

67 Jennifer S. Lowndes, *The Contractor's Emerging Exposure for Design Responsibility*, ABA (May 17, 2017), <https://www.americanbar.org/groups/litigation/committees/construction/articles/2017/spring2017-design-responsibility> (noting how the *Spearin* body of case law clearly protects contractors from design liability in the design-bid-build realm).

68 *See, e.g., Design Professional and Construction Manager Law* 50 (Stephen A. Hess et al. eds., 2007).

69 For a discussion of statutes, rules, and regulations addressing design delegation and related concepts, see Chertoff & Barrett, *supra* note 49.

70 Chertoff & Barrett, *supra* note 49.

71 Nev. Rev. Stat. § 338.1692 3.(a); Ohio Rev. Code Ann. §§ 153.50 (A)(2) to (3), 153.501(B).

- 72 Nev. Rev. Stat. § 338.1692 3.(a) (2021).
- 73 Ohio Rev. Code Ann. §§ 153.50(A)(2) to (3).
- 74 §§ 153.50 (A)(2) to (3).
- 75 § 153.501(B).
- 76 Interestingly enough, lack of regulations that sufficiently clarify design-assist has not stopped states and municipalities from offering free, “standard form” design assist contracts. For instance, the Superior Court of California, County of Solano, has a free PDF available titled, “Design Assist Agreement for Preconstruction and Construction Services.” Superior Ct. Cal., *supra* note 12, at § 1.1.23.
- 77 D.C. Code Mun. Regs. tit. 5-D, § 114.1 (West 2021) (authorizing the use of design-assist).
- 78 Utah Admin. Code R 131-4-501(5)(h).
- 79 *Id.*
- 80 *Delegated Design: Complexities and Effective Implementation*, Ontario Assoc. of Architects (May 4, 2020), <https://oaa.on.ca/knowledge-and-resources/practice-advisory-knowledge-base/practice-advisory-knowledge-base-detail/Delegated-Design-Complexities-and-Effective-Implementation>.
- 81 AIA Large Firm Round Table et al., *Project Planning Guide for Owners and Project Teams: Managing Uncertainty and Expectations in Building Design and Construction*, Dodge Data & Analytics (2014), <https://www.construction.com/toolkit/reports/project-planning-guide-owners-project-teams> [hereinafter *Project Planning Guide*].
- 82 *Id.* at 4.
- 83 Bruner & O'Connor, *supra* note 1, at § 6:18.
- 84 *See generally* Witkin Design Group, Inc. v. Travelers Property Casualty Company of America, 712 Fed. Appx. 894 (11th Cir. 2017).
- 85 Charles J. Carter, *Design-Assist and the AISC Code*, AISC, https://lsc-pagepro.mydigitalpublication.com/publication/?i=562777&article_id=3288851&view=articleBrowser (last visited Oct. 1, 2021).
- 86 *See, e.g.,* Witkin, 712 Fed. Appx., at 897 (defining broad types of project participation as “professional services” under the policy’s professional services exclusion).
- 87 Bruner & O'Connor, *supra* note 1, at § 6:20.
- 88 *Id.* “It is not uncommon for specialty trade contractors who perform design-assist services to develop the expectation that their efforts will result in the securing of construction work. The failure to clearly address this point in the contractual arrangements can be a recipe for dispute.” *Id.*
- 89 *Id.*
- 90 *Compare* Utah Admin. Code R 131-4-501 (stating that design-assist contractors will participate in construction and installation), *with* AdvanceTEC, L.L.C. v. Wohlsen Construction Company, 2017 WL 1904255, *7 (E.D. Va. 2017) (determining that where the contract was silent, the general contractor’s use of the subcontractor’s design-assist services was not contingent on including the subcontractor in project construction).
- 91 AdvanceTEC, L.L.C. v. Wohlsen Construction Company, 2017 WL 1904255 (E.D. Va. 2017).

- 92 [AdvanceTEC, L.L.C. v. Wohlsen Construction Company](#), 2017 WL 1904255, *4 (E.D. Va. 2017).
- 93 *Id.* at *5.
- 94 *Id.* at *2 (“The [letter of intent] contained no provision by which Defendant would acquire any rights in Plaintiff’s work product created pursuant to the Executed [letter of intent].”).
- 95 *Id.* at *7 (denying the plaintiff’s requested relief, noting nothing in the contract suggests that defendant’s continued use of the designs was impermissible).
- 96 Cirilo I. Rangel et al., *Contractors’ Knowledge And Understanding of Design Assist Contracting Risks*, 54th ASC Ann. Int’l Conf. Procs. 355, 359 (2018).
- 97 *Id.*
- 98 *Id.*
- 99 Bruner & O’Connor, *supra* note 1, at § 6:20.
- 100 *See C403-2021 Standard Form of Agreement Between Client and Consultant for Design Assist Services*, AIA Contracts.org, <https://www.aiacontracts.org/contract-documents/6431920-client-and-consultant-agreement-for-design-assist-services> (last visited Apr. 18, 2022) (noting the terms “[t]he scope of a consultant’s design assist services can vary greatly, depending on the expertise of the consultant and the needs of the project. Thus, Article 3 of C403-2021 allows the parties to insert a description of the design assist services or identify an exhibit that contains such a description”).
- 101 *See generally* AIA & AISC White Paper, *supra* note 2.
- 102 Note that ConsensusDocs 200 is specific to lump sum contracts—however, there are different variations of this for different contract types.
- 103 ConsensusDocs 200 Agreement and General Conditions Between Owner and Constructor (2017) [hereinafter CD 200] at Section 3.15.
- 104 Chertoff & Barrett, *supra* note 49.
- 105 CD 200, *supra* note 103, at Article 3, Section 3.1.1.
- 106 *Owner and Constructor Agreement (Lump Sum)*, ConsensusDocs (2017), <https://www.consensusdocs.org/contract/200-3/>.
- 107 ConsensusDocs Guidebook: ConsensusDocs 200-Agreement and General Conditions Between Owner and Constructor (Lump Sum) (2016) [hereinafter CD 200 Guidebook].
- 108 Heusinger, *supra* note 15.
- 109 *See generally* CD 541 Addendum, *supra* note 2; CD 541 Guidebook, *supra* note 2.
- 110 CD 541 Addendum, *supra* note 2.
- 111 Brian Perlberg, *New Design-Assist Guidebook for ConsensusDocs 541 Design-Assist Addendum* (May 17, 2019), <https://www.consensusdocs.org/new-design-assist-guidebook-for-consensusdocs-541-design-assist-addendum/>.
- 112 *See generally* CD 541 Guidebook, *supra* note 2.

- 113 See e.g., *id.* (listing, for example, life-cycle cost analysis, sustainable design recommendations, and risk analysis of factors that could impact cost and schedule).
- 114 CD 541 Addendum, *supra* note 2, at Article 5.
- 115 *Id.*
- 116 *Id.* at Article 3, section 3.2.
- 117 See generally *AdvanceTEC, L.L.C. v. Wohlsen Construction Company*, 2017 WL 1904255, *7 (E.D. Va. 2017) (noting the parties misunderstood whether design-assist participation secured construction-phase participation); CD 541 Addendum, *supra* note 2, at Article 3 (clarifying that unless the parties modify the contract, it is the expectation that the design-assist subcontractor will continue to serve as a project subcontractor during construction).
- 118 Carl A. Salisbury, *What does it mean to provide “professional services?”*, Lexology (Mar. 17, 2014), <https://www.lexology.com/library/detail.aspx?g=e913288a-681f-480e-8642-9159da88ef83>.
- 119 *Id.*
- 120 See generally, AIA, AIA Document C403-2021, Standard form of Agreement Between Client and Consultant for Design Assist Services (2021) [hereinafter C403].
- 121 *Id.* at Art. 3 (leaving it to the parties to define the design assist services, or to attach an exhibit that defines the services).
- 122 AIA & AISC White Paper, *supra* note 2, at 8; see generally AIA, AIA Document A133-2019, Standard form of Agreement between the Owner and Construction Manager as Constructor (2019) [hereinafter A133-2019] (describing pre-construction services of the design-assist nature without expressly labeling those services “design-assist services”).
- 123 A133-2019, *supra* note 122, at § 3.1.1. While portions of this Article discuss select provisions of A133-2019, other sections relating to design-assist include: §§ 3.1.3.1, 3.1.3.3, 3.1.6, 3.1.6.1, 3.1.6.3, 3.1.7, 3.1.8, 3.1.9, 3.1.10, 3.1.11.1, 3.1.11.2, 3.1.11.3, 3.1.12, 3.1.13, and 3.1.14.
- 124 A133-2019, *supra* note 122, at § 3.1.1.
- 125 *Id.* at § 3.1.3.2.
- 126 See *id.* at § 3.1.4 (noting the Construction Manager's participation in schedule creation and periodic updating); *id.* at § 3.1.6.2 (describing the Construction Manager's participation in cost estimations during the design phase).
- 127 *Id.*
- 128 See *Design Assist vs. Delegated Design-Industry Experts Release Recommended Guidance*, Am. Inst. of Steel Constr. (Aug. 17, 2020), <https://www.aisc.org/pressreleases/press-releases/design-assist-vs.-delegated-design—industry-experts-release-recommended-guidance/> (stating the purpose of the white paper was to address ambiguities surrounding collaborative project techniques, including design-assist and design delegation).
- 129 AIA & AISC White Paper, *supra* note 2, at 1.
- 130 *Id.*
- 131 *Id.*

- 132 *Id.* at 3.
- 133 *Id.*
- 134 *Id.*
- 135 *Id.* at 3–4.
- 136 *Id.* at 4.
- 137 *Id.* at 2.
- 138 Mark R. Berry, *Contractor Assumption of Design Responsibility in* Michael A. Branca, Virginia Practice Series: Construction Law § 12:4 (Sept. 2021 update) (using the phrase, “design liability creep” to refer to the shift in design deficiency liability to the contractor over time).
- 139 Dwight A. Larson & Kate A. Golden, *Who's on First? Addressing the Complexities of Who is Responsible to Design What*, 15 J. Am. Coll. Constr. Laws. 45, 46 (2021) (citing design delegation as a deliberate method of design liability transfer, but also noting that inadvertent or unintentional liability assignment happens “more often than design and construction professionals would like to think through unclear and inconsistent contract documents, designs that may be less complete than contemplated by the parties or required by contract, and parties taking it upon themselves to solve problems in ways that may cause them to unwittingly assume design responsibility that has been allocated to others”).
- 140 *Id.*
- 141 *See id.* (stating that “‘design-assist’ [is an] unfortunate misnomer that suggests to some that the contractor has taken on some design responsibility”).
- 142 *Id.*
- 143 *Id.*; *see, e.g., Tibshraeny Bros. Const., Inc. v. U.S.*, 6 Cl. Ct. 463, 32 Cont. Cas. Fed. (CCH) P 73017 (1984) (disputing whether the Government had a contractual obligation to furnish an electrical design); *Coghlin*, 36 N.E.3d at 505 (determining that, in light of its design-related responsibilities, contractor hired as consultant in design phase was not responsible for the design to the extent the contractor could satisfy its burden of proving that it reasonably relied on the design).
- 144 *Delegated Design: Complexities and Effective Implementation*, *supra* note 80.
- 145 *Id.*
- 146 Lowndes, *supra* note 67.
- 147 Jeffery R. Applebaum et al., Cogence All., Design-Assist: The Good, The Bad, and Food For Thought (2018), <https://cogence.org/wp-content/uploads/2018/06/Cogence-Alliance-Design-Assist-Paper-2018.pdf>.
- 148 *See supra* notes 47–48 and accompanying text.
- 149 Andre, *supra* note 46.
- 150 David J. Hatem & Matthew P. Tuller, *Structural Design Delegation*, Structure Mag., Nov. 2009, 1, 1.
- 151 Darren S. Black, *Design Delegation: Who Bears the Risk?*, Risk Strategies (Aug. 13, 2019), <https://www.risk-strategies.com/knowledge-center/article/design-delegation-who-bears-the-risk>.
- 152 CD 541 Addendum, *supra* note 2, at Article 4, section 4.3.

- 153 *Compare* CD 541 Guidebook, *supra* note 2, at 4 (recognizing design-assist requires extensive collaboration), with Applebaum et al., *supra* note 147, at 3 (explaining that increased contractor involvement, and the design team's failure to catch mistakes, may lead to increased problems down the road), and Larson & Golden, *supra* note 139, at 1 (noting uncertainties regarding design responsibility is fraught with uncertainty, "and the uncertainty often leads to significant disputes").
- 154 CD 541Addendum, *supra* note 2, at section 2.3.
- 155 Hatem & Tuller, *supra* note 150, at 1.
- 156 *See* 7 S.C. Juris. Architects § 22.
- 157 *Id.*
- 158 Black, *supra* note 151.
- 159 Duncan v. Missouri Bd. for Architects, Professional Engineers and Land Surveyors, 744 S.W.2d 524, 525 (Mo. Ct. App. E.D. 1988).
- 160 Duncan v. Missouri Bd. for Architects, Professional Engineers and Land Surveyors, 744 S.W.2d 524 (Mo. Ct. App. E.D. 1988).
- 161 *Id.* at 527.
- 162 *Id.*
- 163 *Id.*
- 164 *Id.*
- 165 *Id.* at 528.
- 166 *Id.*
- 167 *Id.*
- 168 *Id.*
- 169 *Id.*
- 170 *Id.* at 538.
- 171 *Id.*
- 172 Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 866 A.2d 270, 61 A.L.R.6th 739 (2005).
- 173 Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 866 A.2d 270, 274, 61 A.L.R.6th 739 (2005).
- 174 *Id.*
- 175 *Id.*
- 176 *Id.*
- 177 *Id.* at 287.
- 178 *See id.* (noting the jurisdictional divide); *see, e.g.,* Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 226 Md. App. 420, 130 A.3d 1024, 1047 (2016), judgment *aff'd*, 451 Md. 600, 155 A.3d

445 (2017) (denying contractor recovery, in part because the economic loss rule prevented a contractor's recovery where the parties were not in privity).

179 See Hatem & Tuller, *supra* note 150, at 1 (explaining the current ambiguous nature of terminology in AIA documents requires “later interpretation by a court or other fact finder to determine what each party believed the scope of services was on the project”).

180 Colo. Rev. Stat. § 12-25-105(7) (2016).

181 *Construction Practices: Design Liability*, Am. Subcontractors Ass'n, <https://www.asaonline.com/construction-practices/> (last visited Oct. 29, 2021).

182 Hatem & Tuller, *supra* note 150, at 2.

183 Richard H. Monk III, *The Professional Services Exclusion: You May Not Have the Coverage You Think*, It Pays to be Covered (Oct. 23, 2017), <https://www.itpaystobecovered.com/2017/10/professional-services-exclusion-may-not-coverage-think/> (discussing an Eleventh Circuit decision where a professional services exclusion left a contractor high and dry).

184 *Witkin Design Group, Inc. v. Travelers Property Casualty Company of America*, 712 Fed. Appx. 894 (11th Cir. 2017).

185 *Witkin*, 712 Fed. Appx. at 895.

186 See *id.* at 895 n.1.

187 *Id.* at 895.

188 *Id.*

189 *Id.*

190 *Id.* at n.2. Total coverage between both policies amounted to \$3 million.

191 *Id.*

192 *Id.*

193 *Id.* at 895–96.

194 *Id.*

195 *Id.* at 895.

196 See *id.* at 896 (noting that to carry out a proper contract analysis in the case, courts must “read each policy as a whole, endeavoring to give every provision its full meaning and operative effect”).

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

201 See, e.g., *id.* at 896 (including in the policy's professional services exclusion activities such as construction contracting, construction administration, supervision of job site safety, and construction management).

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