

LENS BLOG

Should I sign a Contract for Design, in whole or in part?

FIS is seeing a concerted attempt to increase work administered under Contractor Design Portions (CDP). This is an area of growing concern for the sector as it pushes more risk into the supply chain without adequate controls to co-ordinate the design development process effectively.

If you are being confronted with a contract that transfers Design Liability, the first questions to ask is:

What are you being asked to design?

You then need to ask:

1. Are we actually doing the design (or simply taking responsibility for work done by others)?
2. Do you have the capability to deliver design services (can you prove the competency of those who would be doing the design)?
3. Does your insurance cover the scope of this work?

If the answer to any of these questions is “No” then we would strongly recommend that you consider deploying a “Responsible No”. “I do not have the necessary insurance/competency to support this contractual requirement” a is legitimate way to push back.

If you don't already have it, it may seem tempting to take a chance and put some Professional Indemnity cover in place to win the job but remember you will need to hold cover for the period a claim can be made, this could be 15 years.

If you have Professional Indemnity Insurance in place you should check that cover is for the full scope of any design done - there are some very carefully written endorsements in policy documents. It is also important to remember that cover is based on reasonable care and attention – if you cannot effectively demonstrate competence of the individuals making design recommendations then it could limit your ability to claim.

Remember Contractors All Risk cover does not automatically include Professional Indemnity insurance.

Be clear on the scope of any design liability

The next vital consideration is what are you being asked to design. Make sure the extent of your design responsibility is clearly set out and incorporated into the Contract and the Minutes of the Pre-Start Meeting – how will your design input be co-ordinated with other packages? Be particularly wary of soft starts.

It is critical that any competence requirement you are claiming and insurance cover that you hold lines up with the scope of contractual responsibility.

Which interface details/fixings are considered part of the design scope, do these align to warranty or design assurance being offered and will your insurance cover these? Be particularly wary of caveated details that may be included in the drawings and make sure that you are not being asked to provide assurance for details that others cannot (these may well fall out of the scope of your insurance). It is also critical that you align periods of cover (a 5-year warranty when the claims period is 10 years would leave you exposed).

We recommend that you discuss any design responsibility with the employer/contractors as soon as tender documents arrive. Do not leave this until after your tender is submitted.

Can I subcontract design liability?

If you do decide to sign a contract for design and you are subcontracting it to a third party, whilst you may have offset that risk to third party, technically speaking the responsibility still rests with you. A claim could, in the first instance,

be brought against you and you would need to counter claim against the party that did the design. If this third party were no longer trading or the insurance was not suitable or maintained, it would fall

back on you as the responsible party. It is vital that you discuss the process and contractual relationships with the insurer so they can advise and price accordingly.

Don't become the accidental designer

Beyond a full CDP, you may start to see design liability creeping into standard construction contracts. The definition of design in the Construction Design and Management Regulations states:

Designer: any person (including client, contractor or other person referred to in these regulations) who in the course of furtherance of business:

- 1. Prepares or modifies a design or*
- 2. Arranges for or instructs any person under their control to do so*

Design: includes drawings, design details, specifications, BoQ (including specification of articles or substances) relating to a structure and calculations prepared for the purposes of a design.

Beyond a standard Design Development Contract, caution should be exercised with clauses that state you're "deemed to have included for everything necessary to carry out and complete an installation in accordance with the contract" or where you're being asked to assume regulatory responsibility. It is important that you or your team do not assume any design liability through action during the contract period. If "advice" is "approved" by the appropriate person then this should be fine, but it is worth using standard terms to make it clear that you are not assuming any design liability. If you are not clear who the responsible person is to sign off design (ideally it should be clearly identified on a Design Responsibility Matrix) then you should confirm with your client. Expectations should be clarified against any design responsibility matrix or where the inference could be that your price is deemed to include for items the designer overlooked and that you're responsible for recommending or selecting those items.

Many contracts include detailed Design Approval provisions so make you sure you understand these and comply with these. If the employer/contractor fails to comply with timescales then notify them in writing immediately – you may have grounds for an extension of time.

With new regulations now in force across the UK and enforcement powers available to Building Control Authorities this is an area to be particularly careful watchful of. The FIS helpline is here to help, **FIS Members are advised to take further advice from our Contract Review Consultants.**

- Further advice is available via the [FIS Contractual and Legal Toolkit and the Managing Contracts Best Practice Guide available here.](#)
- Find out more about FIS campaign to support better contracting: [The Responsible No](#)
- Did you know you can access contract reviews via the [FIS Contract Review Service](#). The Review will highlight high risk clauses.
- Do we think we have an effective process to manage Design Development....[FIS Consultation Document: A Defined Design Development Process - FIS \(thefis.org\)](#)

Author: LCH Buntton FRICS FCI Arb Hon FRIAS

Buntton Consulting Partnership

2 Ardoch Way

BRACO

Perthshire FK15 9RH

Tel: 01786 880751

len@bunttonconsulting.co.uk