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Direct Dial 301-951-5412

April 29, 2010

Mr. Jim Determan
hord|coplan|macht
750 E. Pratt Street
Suite 1100
Baltimore, MD 21202

Re: Prototype School Buildings

Dear Jim:

As the underwriting manager for the CNA Architects and Engineers Professional Liability Program, the largest professional liability insurance program for design professionals, you have asked us to provide you with comments on the liability issues raised through the use of prototypes in the design of schools.

While the reuse of architectural plans and specifications is, for the most part, an issue of fair and reasonable compensation, there are professional liability implications. And, of course, there is the significant issue of protecting the public. This obligation is not only that of the client but is a basic professional responsibility of an architect. In general, we are concerned with this approach to project delivery for the following reasons:

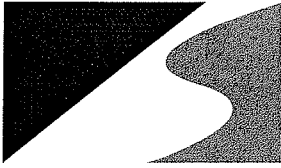
- ❑ If the preparer of the drawings and specifications is not signing and sealing the documents, this will require another's signature and seal in order to obtain the required building permits. This procedure may be a direct violation of the State Practice Act.
- ❑ How is site adaptation to be accomplished? A design, which is appropriate for one location, may not be appropriate for re-use. Differing site conditions, soils, north-south orientation, etc., will necessitate extensive modifications.
- ❑ If the end user, i.e., the local school administrative unit, fails to consider these issues in a timely manner, the result will be substantially increased construction costs resulting from change orders.

Let's look at these issues in greater detail.

Because the design developed for a client by an architect is the culmination of a creative process and the plans and specifications to assist the contractor in transforming the recommendations of the architect into a building are instruments of the creative service provided by the architect to the client, the federal government has enacted copyright protection for the design and its documentation. Essentially, this protection extends not only to the ideas embodied in the documentation, but to the right to own the physical documents and to the right to copy them as well. Design professionals, of course, can agree to transfer all or part of their copyright protections through the contract or licensing agreements, or a transfer can be

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effectuated by operation of law. While it is possible for all or part of the rights of the creator to be transferred to the owner, architects must remain aware that such a transfer does not by itself extinguish future liability to third parties from the reuse of the transferred instruments of service.

From our experience with the transfer of the ownership and use of documents to an owner, it is important to protect the design professional against the unauthorized or improper reuse of documents by the owner or others. We routinely recommend that in any transfer agreement it should be specifically stated that reuse without the design professional's verification and adaptation will be at the owner's sole risk, and that the owner shall indemnify and hold harmless the design professional for all claims and losses resulting from such reuse. Public clients seem to have little understanding of the types of claims against design professionals that the reuse of instruments of service can generate; the risk does not disappear but, indeed, intensifies. This is because any reuse, such as for a future modification, alteration or renovation, or as the basis for a different project may result in meritless claims against the original design professional.

Architects, their interprofessional consulting engineers, and other design professionals provide their services within a business context. To a certain extent that business context can be managed. For instance, if the design professional is providing a prototype design, that design professional can price its services according to the value of that design and costs of the risks the design professional is forced to assume in preparing that prototype design. For a client to think, however, that it can simply reuse design solutions without appropriate professional participation, the client is ignoring the risks to itself, the public, and design professionals intrinsic in such a determination.

The services architects provide to a school district or other public entity are indispensable in creating value and improving the quality of education and the life for the citizens in a jurisdiction. Those services often are documented in plans and specifications. These are instruments of professional service and not products. They are suitable for a specific purpose and rarely are appropriate for unrestricted reuse or unqualified adaptation.

Another area of concern, and one of the most difficult aspects of the use of a prototype design, is that each application differs. Site constraints differ, thus causing a redesign of foundations and, at times, entire structural systems. Codes and standards change requiring a reassessment of original design recommendations. Innovative materials and systems compel an analysis of their applicability, effectiveness and safety. Plans and specifications cannot be simply reused. As with textbooks and other aids to education, school building projects must be responsive to the learning community, the level of investment needed to create an effective educational process, and developments in society and technology.

While there may be some value for a project owner who intends on building similar projects to have a prototype or "kit-of-parts" approach to standardize some aspects of the design decision-making process, the economic advantages of using a prototype design are often illusory. Project owners must have properly credentialed professionals review or verify the design for compliance with



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locally applicable laws, statutes, ordinances, codes, rules, and regulations at the time of the adaptation of this design for a specific facility. This review process could be extensive depending on the site conditions, local requirements, and state registration law proscriptions that require the active participation of a licensed design professional to take responsible charge of a project to protect public safety.

In addition, as clients become more concerned about energy and environmental impacts of projects and seek efficiency in operations and maintenance, the use of a prototype design takes on a different meaning. While some aspects of an environmentally responsive design can be addressed through a prototype solution, that solution must be carefully site-adapted. Project orientation for the appropriate control of day lighting, heat gain, and passive heating and ventilation is just one example. The use of locally sourced building materials and the response to construction energy use and waste control also require specific design considerations. While in theory the idea of having only one way to design a school project, much like having only one way to educate a student, is attractive, such a solution – in either situation – is neither effective nor cost-efficient.

In summary, at first blush this appears to be a sound and economical way of reducing the cost of new school construction. However, the potential for increased liability exposures, increased construction costs and unsatisfactory results are more likely outcomes.

Sincerely,

KJC/skr