

Paper Title: Design Delegation – Legal Definitions, Practical Considerations and the Need for Clarity

Gregory H. Chertoff
Navid Ansari

Peckar & Abramson, PC
1325 Avenue of the Americas, 10th Floor
New York, NY 10019
GChertoff@pecklaw.com
NAAnsari@pecklaw.com

Session Title: Design Delegation: Legal Definitions and Practical Effects

Presented by:

Robert Barbara, SVP & General Manager, Turner Engineering Group

Gregory H. Chertoff, Co-Managing Partner, Peckar & Abramson's New York Office

Stephen Weinryb, Senior Principal/Technical Principal. HOK

Alberto Franceschet, Senior VP and General Manager – East, Parmasteelisa North America Corp.

Christian Jharling, VP & General Manager, Turner Construction Company – Federal Services

Author Biographical Information:

Gregory Chertoff is the Co-Manager Partner of Peckar & Abramson's New York office, where he specializes in construction law, regularly counseling general contractors, construction managers, EPC contractors and owners. He frequently addresses claims involving breach of contract, construction and design defects, insurance issues and represents many of the nation's largest contractors in building and civil works projects. Greg has been recognized by Chambers USA in Construction Law, New York Super Lawyers-Metro in Construction Litigation and among the Best Lawyers in America.

Navid Ansari is an associate in Peckar & Abramson's New York office where he focuses on matters involving complex, multi-party construction litigation, including design and construction defect litigation matters. He has experience serving as an Adjunct Lecturer of Criminal Procedure law and also previously worked as a Securities Regulation Compliance Auditor for a major financial services group.

Design Delegation – Legal Definitions, Practical Considerations and the Need for Clarity.

By Gregory H. Chertoff and Navid Ansari, Peckar & Abramson, PC

“Design Delegation” has existed in various, ad hoc, forms for generations. Look at building plans from a hundred and fifty years ago. Typically, they provided a designer’s general intent, but the details of how the intent was to be executed were left to the craftspeople actually executing the work. Over time, the trend shifted to designers providing more and more specific detail, defining with much greater particularity that which the contractors were to build. More recently, with respect to an increasing number of scopes of work, the pendulum is, for many practical reasons, shifting back to designers providing less detail and more performance criteria; delegating to specialty contractors the manner in which they, and their often proprietary systems, will go about achieving the designers’ performance requirements.

The construction industry has its own language, short hand and a unique embrace of acronyms. Terminology is often used loosely, leading to confusion, misunderstandings and unclear divisions of roles and responsibilities. This lack of clarity leads to disputes. “Delegated design,” “Design-assist,” “Design-completion,” “Value-engineering,” are all terms that are loosely used, none of which have a uniformly applied, standard definition in the industry or case law.

So let’s start with a practical definition of “Design Delegation” as it will be used in this paper: “The delegation, by the provision of performance criteria, of the design responsibility of a discrete portion of a construction project by the licensed, professional ‘Design Team of Record’ (the “Delegator”), typically through an unlicensed construction manager or general contractor, to a specialty contractor (the “Delegatee”). The Delegatee will typically employ licensed specialty designers, who will generate and be responsible for the design and construction of the delegated portion of the project, the intent of which is to comply with and achieve the performance criteria specified by the Delegator.”

This type of design delegation will be familiar to many in the context of structural steel connection details (at least in parts of the country), curtain wall systems, metal panel systems, cold-formed metal framing systems, fire suppression systems, among others. An informal survey of contractors, designers and specification writers, indicates that more than a hundred types of scope of work are now contemplated as potentially design delegated, including among many others: plumbing expansion, hangers/supports and vibration and seismic controls; laboratory piping and equipment; HVAC controls; all manner of facility piping; metal and non-metal ducts; boilers and pumps; cooling towers; packaged air conditioning units; electrical equipment and systems; auger cast grout piles; fences and gates; all manner of concrete systems, including pre-cast, post-

tensioned and architectural; metal stairs; roof systems; glazing assemblies of all sorts; gypsum board assemblies; casework and flagpoles; just to name a handful.

The trend makes sense. Specialty manufacturers skin their cats differently. If an owner's Design Team of Record designed every nut, bolt, extrusion and gasket of a curtain wall system, none of the major curtain wall contractors could efficiently achieve the specified result, as they each have their own unique ways of achieving the desired goal. They have their own approaches, fabrication and manufacturing techniques, supply chains, assembly and installation methods, etc. They could not effectively re-tool their operations to build a bespoke system designed by others. Nor would that be desirable; it only makes sense to have those specialty contractors that are most experienced in their unique disciplines have an influential hand in how the goal is achieved.

A Clarion Call for Clarity

The design and construction industry, those that legislate and regulate it and, perhaps most importantly, those who draft their contracts, need to thoughtfully and deliberately embrace, understand and dissect this trend and develop an effective practical framework for how design delegation is to operate. Currently, as discussed below in an overview of currently existing regulations, there are only a handful of state regulations that address the issue; and those that do, do so only generally.

The AIA and ConsensusDOCS form agreements both include language relating to the general apportionment of responsibility and the overall process for design delegation between the project participants. See, AIA A201-2017, Section 3.1.12.10.1; ConsensusDOCS 200, Section 3.15.

The ConsensusDOCS 200 – Agreement and General Conditions between Owner and Constructor, Section 3.15 (2017) provides:

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

The AIA General Conditions – AIA A201-2017, Section 3.12.10.1 provides:

If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional.

Each of these clauses require that the Delegatee be provided performance and design criteria with which the Delegatee's design must comply. However, this is a mere general framework for how the process is to work. The devil, as they say, is in the details. How design delegation is to operate effectively in practice, in is granular details, likely with somewhat different and tailored approaches depending upon the specific scopes of work being design delegated, and how it is to do so for all the various scopes of work to which it is being applied, is an essential challenge the industry must embrace and solve to avoid failed endeavors and costly and complicated disputes. The industry should strive for and achieve clarity for this process and reduce that clarity to specifications, contract documents and collaborative processes, specifically tailored to the different scopes of work that are delegated, that fairly and properly apportion responsibilities among the various project participants. Clarity requires greater specificity.

Additional Critical Considerations

Key areas of challenge that should be addressed where applicable in a given project's contract documents, and more broadly by the industry to create a fair set of standards, include, among many others:

- Is it legal? Laws, to the extent they exist in this area, vary widely regarding the permissibility and the processes by which design may be delegated (see survey below). In some cases, it may be illegal (and perhaps criminal) to delegate design responsibilities. The first questions that must be explored for any design delegation situation is whether it can be done legally and, if it can, how to ensure that it is done so in a complaint way.
- Who owns the gaps? When various delegated design and traditionally designed systems interface, which project participant is responsible, legally and practically, for ensuring that they all interface effectively? Some examples, born of the personal experience of the authors, include the interface on a façade of traditionally designed brick piers with

delegated design metal panel systems, delegated design window wall systems and delegated design pre-cast panels, each by different entities. Put them all together and water and air infiltrated because how they were all to be tied together was not clearly resolved. Each Delegatee, fairly based on the plans and specifications, contended that they were responsible only for the outer edge of their systems inward, not for how they interfaced with adjoining systems and materials.

These kinds of conditions must be thought through up front and addressed, specifically, in the contract documents, the plans and specifications and the performance criteria to avoid negative results.

- How is liability for failure to achieve the goal to be treated? Designers and contractors are typically held to different legal standards. Designers are usually held to a professional standard of care, generally defined as the ordinary and reasonable care usually exercised by one in that profession, on the same type of project, at the same time and in the same place, under similar circumstances and conditions. In practice, that means that designers can, without liability, engage in “non-negligent error.” Their work can fail to achieve the desired result, but if they were not negligent in how they went about their failure, they are not legally liable for it.

Contractors, by contrast, are, absent unusual circumstances, held to substantially perform their contractual obligations. If a contractor fails to build pursuant to the plans and specifications, it is liable for the damages that result pursuant to the terms of the contract; they cannot fail to do so and yet still escape liability because they nevertheless met a standard of care.

Design delegation hybridizes those roles. Typically, a prime contractor is contractually agreeing to take on the challenge of procuring a design to achieve the required performance criteria and flowing that responsibility down to a specialty contractor and its designers. Unless the contract specifically provides otherwise, the prime contractor may not get the benefit of having only to perform to a professional standard of care with respect to the design services component despite the clear intent of all concerned that it is going to contract for and procure professional services to be rendered.

Parties entering into contracts with design delegated components (and you probably already are doing so), should consider this significant issue and address it deliberately in their negotiations and contract documents. Either accept the risks knowingly and price for them accordingly, or employ contract language that bifurcates the standards to which the contractor is going to be held; a professional standard of care for the professional

services it is agreeing to procure and provide and a contract standard for the traditional construction work.

So, too, must deliberate consideration be given to how the various insurances on the project are going to be procured and operate in this non-traditional paradigm. Insurance risk managers should be brought in as part of the team to ensure that each participant has appropriate coverage for their respective disciplines and contractual and professional responsibilities. Again, clear contract language reflecting a deliberate plan is the order of the day.

- What do the stamps mean? Typically (although not always) in a delegated design situation, the Delegatee will submit plans, specifications, shop drawings or other similar documents and information regarding its design up the chain to the design Delegator for its review and for some degree of “review” or “approval.” Under some existing regulatory approaches and some existing forms of contract documents, that Delegator review is to confirm the design’s general conformance to the Delegator’s specified performance criteria. Here, too, however, there is no measure of industry uniformity or standardization as to these roles and responsibilities. The “approved,” or “approved-as-noted,” or “rejected” or similar stamps that are routinely employed as part of the submittal and review process by various design firms are themselves not uniform in their language and, often, are not tailored to differentiate between a Designer of Record’s traditional roles and the different, and perhaps more limited, role they play in a delegated design paradigm. Significant legal battles have been waged over the import of the fine print in these routinely employed stamps, which, truth be told, are often read by no one other than those who first created them and the lawyers that argue about them when something has gone wrong.

These are just a few of the knotty issues that the industry should confront head on and achieve clarity with respect to, in order to promote effective operations, ensure clear divisions of responsibility both practically and legally, to avoid problems born of each participant believing another has “it” covered, and to, hopefully, minimize disputes.

A Survey of Existing State Laws Governing Delegated Design

A few states have begun to address design delegation issues through legislation or regulation. Among the small group that have, the degree and manner of their attempts varies considerably, and in some cases, presents potentially irreconcilable inconsistencies with other aspects of the jurisdiction’s regulatory framework.

Now – the disclaimer: Discussed below are some of the more significant state existing rules, regulations and cases. This survey is by no means exhaustive and is provided only to demonstrate the variability in the existing laws relating to design delegation. It is not intended to be legal advice. If actual issues arise, a thorough analysis, by a qualified lawyer, should be undertaken to ensure compliance with all applicable laws.

Since each state’s existing professional and trade licensing statutes reflect their own public policies, the various modes in which they attempt to address design delegation, if at all, are not consistent. Some redefine “unprofessional conduct” to exclude the act of delegation, while others exempt the requirement that certain plans and specifications bear a licensee’s signature and seal. Some treat architecture and engineering without distinction, while others will impose greater restrictions on the practice of one profession over the other.

The uncertainty should be concern for participant in a design delegation process, particularly because what is generally consistent among many jurisdictions is that a violation of professional licensure statutes may render their contract, perhaps even one that has been substantially performed, void and unenforceable, precluding recovery for its breach. Depending on the jurisdiction, it may also result in felony or misdemeanor criminal exposure.

NEW YORK

New York has begun to address design delegation in the form of a rule adopted by the Board of the Regents of the State Education Department (“Delegation Rule”), which governs architectural and engineering licensure.^{1, 2} The Delegation Rule exempts from “unprofessional conduct” the delegation of specifically defined “ancillary” design work, through an “intermediate entity,” under the following framework:

1. the specifically defined work is limited to “ancillary” components;
2. all parameters that the design must satisfy are specified in writing by the delegator;
3. the design meets performance specifications established by the delegator;

¹ See N.Y. Bus.Corp.L. §§ 1503(d) and 1501(a); *see also* N.Y. Educ.L. § 7210(3).

² Statutes governing the profession of architecture may be found at N.Y. Educ.L. §§ 7300-7308; and engineering at N.Y. Educ.L. §§ 7200-7210.

4. the delegatee is licensed^{3, 4} to perform the design work and signs and certifies⁵ the design;
5. the delegator reviews and approves, in writing, the design for conformance with the established specifications and parameters;⁶ and
6. the delegator determines, in writing, that the design conforms to the overall project design and can be integrated into the project^{7, 8}

In this framework the contractor is, ostensibly, the “intermediate entity” through which the delegation passes.⁹ The specific process and procedures by which the delegation is effectively passed is, however, not addressed in the regulation. As the rule defines the term, the delegatee may be “employed or retained” by the intermediate entity. Seemingly straightforward, that definition presents a problem insofar as other aspects of New York law would appear to prohibit the direct employment of the delegatee by a contractor.¹⁰

³ Or otherwise legally authorized to perform the required design work. 8 N.Y.C.R.R. § 29.3(b)(2)(iv).

⁴ It is unprofessional conduct to delegate responsibility knowing or having reason to know that the delegate is not qualified to perform the responsibilities. 8 N.Y.C.R.R. § 29.1(b)(10).

⁵ “Certify” is defined to mean “a written statement by a licensee confirming responsibility for the work and attesting that the work prepared meets the specifications (as well as conforming to governing codes applicable at the time the work was prepared), and conforms to prevailing standards of practice. 8 N.Y.C.R.R. § 29.3(b)(3)(iv).

⁶ See *Reilly v. Board of Regents of University of the State of New York*, 250 A.D.2d 884, 885 (App.Div.3rd 1998)(Architect violated Delegation Rule insofar as he failed to keep a record of his review of plans prepared by another individual).

⁷ 8 N.Y.C.R.R. § 29.3(b)(2).

⁸ The New York State Department of Education, Office of Professions, has issued Practice Guidelines relative to delegation under 8 N.Y.C.R.R. § 29.3(b)(2). See <http://www.op.nysed.gov/prof/arch/archguide-b7.htm> (architecture) and <http://www.op.nysed.gov/prof/pels/peguide4-delegation.htm> (engineering).

⁹ “Intermediate entity” is defined to mean “a person or entity, typically a contractor or subcontractor, responsible for performing the work under the contract for construction. 8 N.Y.C.R.R. § 29.3(b)(3)(ii).

¹⁰ See N.Y. Educ.L. § 7307(2); N.Y. Educ.L. § 7210(1); N.Y. Bus.Corp. Law § 1503(a) and (b), and *SKR Design Group v. Yonehama, Inc.*, 230 A.D.2d 533, 535 (App.Div.1st 1997)(All standing for the prohibition against the performance of professional design services by a regular business corporation); see also N.Y. Educ.L. § 6509-

A trial court that considered early challenge to the rule commented, consistent with the public policy informing the licensing laws, that the Delegation Rule did not permit a general business corporation to practice a design profession even if it employed licensed professionals, but instead permitted the corporation to contract with a licensed professional for the performance of the delegated work. See *General Bldg. Contractors of New York State, Inc. v. New York State Educ. Dept.*, 175 Misc.2d 922, 928-9 (1997).

Historically, even the retention of an organizationally independent design professional by an unlicensed entity, who is not the owner of the project, has presented legal obstacles for contractors. Insofar as the contractor could be deemed to have violated the licensing laws, their contract could be determined void, precluding them from recovery in contract or under a theory of *quantum meruit*. See *Charlebois v. J.M. Weller Associates, Inc.*, 72 N.Y.2d 587, 592-3 (1988). In *Charlebois*, however, New York's highest court indicated that under certain circumstances such an arrangement would not violate either New York law or the public policy underlying the law's prohibitions. *Id.* at 591-2.¹¹

The *Charlebois* court held that a contractor's agreement with an owner was not void (as against New York's licensing statutes and public policy) where the agreement provided that the contractor would engage a specified licensed professional to perform the design aspects of the contract. *Id.* Since *Charlebois*, New York's courts have further qualified the prohibition against unlicensed practice that might otherwise result in a void and unenforceable contract were a delegation of design through an unlicensed "intermediate entity" to occur.

In *SKR Design Group. v. Yonehama, Inc.* an appellate court held that there was no violation of New York's licensing laws where a corporation, that was ordinarily prohibited from contracting for architectural services, included a provision in its contract to the effect that the required design services would be performed by qualified licensed professionals. 230 A.D.2d 533, 537 (App.Div.1st 1997). Relying on *Charlebois*, the *SKR Design* court reasoned that because the design professionals who were to perform the work were still subject to New York's regulatory framework, there was no statutory violation nor an infringement of the

a, and 8 N.Y.C.R.R. § 29.1(4)(prohibitions against sharing fees with unlicensed persons).

¹¹ Cf. *P.C. Chipouras & Assoc. v. 212 Realty Corp.*, 156 A.D.2d 549, 549-50 (App.Div.2nd 1989) Plaintiff, unlicensed architect, violated licensing statute (N.Y. Educ.L. § 7302) and thus could not recover for the performance of either non-architectural work, or for architectural work that was performed by licensed architects.; see also N.Y. Educ.L. § 6512, which provides for criminal felony exposure for anyone who practices, offers to practice, holds themselves out as being able to practice, or who aids and abets another in practicing a profession without a required license.

public policy underlying the licensing statutes. *Id.* The fact that the contract did not specifically designate the design professional who would perform the services did not alter the analysis. *Id.*

Similarly, in 2012, relying on *Charlebois* and *SKR Design*, an appellate court held that an unlicensed entity's use of a licensed entity to perform required design work did not violate the licensing statutes.¹² See *Cherokee Owners Corp. v. DNA Contr., LLC*, 96 A.D.3d 480 (App.Div.1st 2012). The following year, the same appellate court upheld an "arrangement" whereby an unlicensed entity's licensed, but not registered, employee-architect prepared the project plans under the supervision of a registered architect who was retained by the unlicensed entity as a consultant. *McIver-Morgan, Inc. v. Dal Piaz*, 108 A.D.3d 47, 54-5 (App.Div.1st 2013). The *McIver* court advocated a "common sense" approach that (a) considers all of the circumstances in determining whether the goals of the licensing laws are met, and (b) does not elevate form over substance. *Id.* at 53, 54-5.

Building on *McIver*, in *H&L Elec. Inc. v. Midtown Equities LLC* an appellate court held that though an electrical contractor was not licensed to perform engineering design work, its complaint had sufficiently alleged the involvement of a licensed engineer¹³ in its preparation of electrical designs, so as to satisfy the policy underlying the licensing statutes. 151 A.D.3d 660, 661-2 (App.Div.1st 2017). What stands out about *H&L Elec.* is that there was no contract between the parties that referenced the involvement of a design professional. See *Id.* at 660. Rather, the court observed that the general prohibition against recovering payment for providing unlicensed professional services is "not an absolute rule," and that instead, a "common sense" approach should be applied that would avoid turning the public policy concerns upon which the prohibition is based into a technical legal basis that a party, who has received the benefits of contracted-for performance, might employ to avoid its reciprocal obligation to pay for those benefits. See *Id.* at 661-2.

While New York statutory and case law framework applicable to design delegation is among the more robust of the surveyed states, it nevertheless does not provide comprehensive. It certainly does not get into the details of how it should work effectively in practice to avoid disputes between the participants; good contract and specification drafting needs to fill that void.

FLORIDA

¹² The *Cherokee* court made specific reference to N.Y. Educ.L. § 7202.

¹³ The alleged licensed engineer was part of the project design team and not an employee of H&L Electric Inc. or a licensed engineer retained by them. See Index No. 654422/2015, Supreme Court of the State of New York, New York County, New York State Courts Electronic Filing Doc. No. 53, ¶¶ 9-12.

Florida's Administrative Code provides a framework for the delegation of engineering design, apparently between and among engineers, *in the absence of a contractual relationship between them* that would delineate the roles of each party.¹⁴ Presented as a general guideline, the framework offers that adherence to its dictates may avoid conduct that would otherwise be grounds for professional discipline.¹⁵ The framework's organization defines the roles and responsibilities of three defined parties: (1) a Prime Professional Engineer;¹⁶ (2) an Engineer of Record;¹⁷ and (3) a Delegated Engineer of Record.¹⁸

The only responsibility of the Prime Professional Engineer, "where one exists," is to retain and coordinate the services of other professionals needed to complete the contracted-for services.¹⁹

The Engineer of Record, being the delegator, is required to communicate his or her engineering requirements in writing to the delegatee; and to review the delegatee's designs to ensure that: (a) they have been prepared by an engineer, (b) that they conform with the Engineer of Record's intent and meet his or her written

¹⁴ See Fla.Admin.Code.R. 61G15-30.001.

¹⁵ *Id.*

¹⁶ Defined as "A Florida professional engineer or a duly qualified engineering corporation or partnership, who is engaged by the client to provide any planning, design, coordination, arrangement and permitting for the project and for construction observation in connection with any engineering project, service or creative work. The prime professional may also be the engineer of record on the same project." Fla.Admin.Code.R. 61G15-30.002(2).

¹⁷ Defined as "A Florida professional engineer who is in responsible charge for the preparation, signing, dating, sealing and issuing of any engineering document(s) for any engineering service or creative work." Fla.Admin.Code.R. 61G15-30.002(1).

¹⁸ Defined as "A Florida professional engineer who undertakes a specialty service and provides services or creative work (delegated engineering document) regarding a portion of an engineering project. The delegated engineer is the engineer of record for that portion of the engineering project. A delegated engineer usually falls into one of the following categories: (a) [a]n independent consultant; (b) [a]n employee or officer of an entity supplying components to a fabricator or contractor, so long as the engineer acts as an independent consultant or through a duly qualified engineering corporation; (c) [a]n employee or officer of a fabricator or contractor, so long as the engineer acts as an independent consultant or through a duly qualified engineering corporation." Fla.Admin.Code.R. 61G15-30.002(3).

¹⁹ Fla.Admin.Code.R. 61G15-30.007.

criteria; and (c) that the effect of the delegated design on the overall project conforms with the intent of the Engineer of Record.²⁰

The Delegated Engineer of Record is initially required to review the written engineering requirements and authorization *to determine the appropriate scope of engineering*.²¹ If there are “details, features, or unanticipated project limits which conflict with the written engineering requirements” the delegatee is required to “timely” contact the Engineer of Record to resolve the conflicts.²² Otherwise, the delegatee is required to prepare engineering documents that comply with the written engineering requirements received from the Engineer of Record, and to sign and seal the documents.²³

With respect to certain engineering disciplines, Florida’s administrative code includes delegation guidelines in addition to the general framework. Specific rules govern the delegation of structural engineering,²⁴ mechanical engineering,²⁵ electrical engineering,²⁶ and fire protection.²⁷

Florida’s law also includes express exemptions from its professional licensing laws for any certified or registered general contractors who are negotiating or performing under a design-build contract, provided that the contracted-for professional design services are offered or rendered by an architect or engineer who is properly licensed under Florida law.²⁸ Florida’s design-build exemption²⁹ does not require the contractor to individually identify the performing design professional in the contract. *Diaz & Russell Corp. v. Dept. of Bus. And Prof. Reg.*, 140 So.3d 662, 665 (2014).³⁰

MISSOURI

²⁰ Fla.Admin.Code.R. 61G15-30.005.

²¹ Fla.Admin.Code.R. 61G15-30.006(1).

²² Fla.Admin.Code.R. 61G15-30.006(2).

²³ *Id.*

²⁴ See Fla.Admin.Code.R. 61G15-31.001 through 61G15-31.009.

²⁵ See Fla.Admin.Code.R. 61G15-34.001 through 61G15-34.009.

²⁶ See Fla.Admin.Code.R. 61G15-33.001 through 61G15-33.010.

²⁷ See Fla.Admin.Code.R. 61G15-32.001 through 61G15-32.009.

²⁸ F.S.A. § 481.229(3) (architecture) and F.S.A. § 471.003(2)(i) (engineering).

²⁹ Specifically, the exemption from the architectural licensure requirements, see F.S.A. § 481.229(3).

³⁰ Whether a contractor actually offers or renders professional design services appeared to be the critical inquiry for the *Diaz* court. See 140 So.3d at 665.

Where projects involve more than one engineer, a recently amended Missouri regulation seeks to delineate the respective roles of the engineer of record, “specialty” engineers, and the architect of record.³¹ In this framework the “specialty” engineer is “one who provides services for specific portions of the project within a particular engineering discipline, *but does not have a direct organizational relationship with the engineer*³² of record[.]”³³

While the amended regulation details the respective roles of the project engineers, it does not speak to the propriety of a contractor’s potential direct employment of the “specialty” engineer. In this regard, Missouri, unlike some other jurisdictions, permits domestic corporations to practice engineering, as one of their existential purposes, and to obtain a Certificate of Authority in furtherance of the provision of such services.^{34, 35}

Assuming it is permitted, were the contractor to directly employ the “specialty” designer, it should be mindful that while the Engineer of Record must review and remain in responsible charge³⁶ for the technical submissions, he or she may also include what is tantamount to a disclaimer with their signature and seal that in effect identifies the portions of any technical documents intended to be authenticated by their seal, and disclaims responsibility for all other technical submissions.³⁷

³¹ See 20 C.S.R. § 2030-21.020 (effective December 30, 2018 as amended).

³² The architect of record may delegate engineering work provided that he or she follows the same requirements as the delegating Engineer of Record. 20 C.S.R. § 2030-21.020(1)(E) (effective December 30, 2018 as amended).

³³ 20 C.S.R. § 2030-21.020(1) (effective December 30, 2018 as amended).

³⁴ Mo.St. § 327.401(2).

³⁵ Missouri also has a design-build exemption which permits a design-build contractor to enter into a design-build contract without having obtained a Certificate of Registration or Certificate of Authority. See Mo.St. § 327.465.

³⁶ Defined as “the independent direct control of a licensee’s work and personal supervision of such work pertaining to the practice of architecture, engineering, land surveying, or landscape architecture.” Mo.St. § 327.011(16).

³⁷ See Mo.St. § 327.411(3); cf. *Duncan v. Missouri Bd. For Architects*, 744 S.W.2d 524, 541 (1988) (Responsibility for structural integrity and safety may not be delegated). Please also see 20 C.S.R. § 2030-3.060(8) (concerning responsibility for shared design).

CALIFORNIA

California regulations expressly permit design delegation in the context of public school construction.³⁸ The scope of the permissible delegation is not limited to “ancillary” components,³⁹ and may encompass “any portion of the work.”⁴⁰ The delegation does not, however, relieve the delegating architect or engineer of their responsibilities.⁴¹ A delegation pursuant to this regulation must also be “clearly outlined,” accepted, and approved by the parties, including the school board.⁴²

The regulatory scheme, however, expressly prohibits the delegation of any portion of the work to an architect or engineer who is or who has an employment relationship with a “contracting party for the construction.”⁴³

In general, California permits domestic corporations to contract to furnish architectural services as long as the architectural services are offered and provided under the responsible control⁴⁴ of a licensed architect.⁴⁵ An architect is not prohibited from forming a business entity, or collaborating, including in the context of an employment relationship, with non-architects, as long as any architectural services are provided under the responsible control of an architect.⁴⁶

Consistent with these statutes, California’s professional licensing laws respecting the practice of architecture exempt a contractor’s designing of “systems and facilities” necessary to the completion of the work that contractor has agreed or offered to perform, as long as those design services are performed by or under the direct supervision of a licensed architect or professional or civil engineer⁴⁷.

A similar exemption permits mechanical and electrical contractors to design “systems or facilities” provided that the mechanical or electrical engineering is

³⁸ See 21 C.C.R. § 16.

³⁹ See 8 N.Y.C.R.R. § 29.3.

⁴⁰ 21 C.C.R. § 16(b).

⁴¹ See 21 C.C.R. § 16(b) and (a).

⁴² 21 C.C.R. § 16(d).

⁴³ See 21 C.C.R. § 15(b).

⁴⁴ Defined to mean “that amount of control over the content of all architectural instruments of service during their preparation that is ordinarily exercised by architects applying the required professional standard of care.” Cal. Bus. & Prof. Code § 5535.1.

⁴⁵ Cal. Bus. & Prof. Code § 5535.3; *see also* *Walter M. Ballard Corp. v. Dougherty*, 106 Cal.App.2d 35, 40 (Corporation is not prohibited from contracting to furnish architectural design prepared by a third-party architect).

⁴⁶ Cal. Bus. & Prof. Code § 5535.2 and § 5535.25.

⁴⁷ Cal. Bus. & Prof. Code § 5537.2.

performed by or under the responsible charge⁴⁸ of a registered electrical or mechanical engineer.⁴⁹ Like the prior exemption, this section expressly provides that it is not “intended to imply that a licensed contractor may design work which is to be installed by another person.”⁵⁰

OHIO

In addition to the design-build exemptions to its licensing laws respecting the practice of architecture⁵¹ and engineering,⁵² Ohio expressly permits a public authority⁵³ to authorize a construction manager at risk⁵⁴ or a design-build firm to utilize a design-assist firm⁵⁵ on any public improvement project.⁵⁶ The Construction manager at risk, however, retains any liability for the design work.⁵⁷

MASSACHUSETTS

An exemption from Massachusetts’ licensing framework relative to engineers permits that in connection with the practice of any trade; plans, specifications, or shop drawings may be prepared for work that is to be installed by the same person

⁴⁸ Defined in the relevant chapter to mean “the independent control and direction, by the use of initiative, skill, and independent judgment, of the investigation or design of professional engineering work or the direct engineering control of such projects. Cal. Bus. & Prof. Code § 6703.

⁴⁹ Cal. Bus. & Prof. Code § 6737.3.

⁵⁰ *Id.*

⁵¹ See Ohio Rev. Code § 4703.182.

⁵² See Ohio Rev. Code § 4733.161.

⁵³ Defined to mean “the state, as state institution of higher education [...], a county, township, municipal corporation, school district, or other political subdivision, or any public agency authority, board, commission, instrumentality, or special purpose district of the state or of a political subdivision.” Ohio Admin Code § 153:1-3-01(B); Ohio Rev. Code § 153.65(A)(1).

⁵⁴ Defined to mean “a person with substantial discretion and authority to plan, coordinate, manage, direct, and construct all phases of a project for the construction, demolition, alteration, repair, or reconstruction of any public building, structure, or other improvement and who provides the public authority a guaranteed maximum price as determined in section 9.334 of the Revised Code.” Ohio Rev. Code § 153.50(A)(1); Ohio Rev. Code § 9.33(B)(1).

⁵⁵ Defined to mean “a person capable of providing design-assist services.” Ohio Rev. Code § 153.50(3). “Design-assist services” being the “monitoring and assisting in the completion of the plans and specifications.” *Id.* at § 153.50(2).

⁵⁶ Ohio Rev. Code § 153.501(B).

⁵⁷ Ohio Rev. Code § 153.501.

or business entity.⁵⁸ Among the architecture-related statutes, another exemption exists for the preparation of any “detailed or shop plans required to be furnished by a contractor.”⁵⁹

Plans and specifications prepared under these statutes are further exempted from the state-wide prohibition against the acceptance, by a public official, of any plans or specifications that do not bear the seal of a registered architect or engineer.⁶⁰

Notably, a 2015 regulation implies a distinction between the engineering design exemption and the architectural design exemption.⁶¹ That regulation, while specifically incorporating M.G.L.c. 143 § 54A (which incorporates both exemptions), makes specific reference to the engineering design exemption only. With respect to the engineering design exemption, the regulation empowers a building official to require that in *lieu* of signed and sealed plans, that a registered design professional review and approve the “shop or record drawings” for general conformance with the design concept.⁶²

TEXAS

Texas decisional law has made a distinction between contracting to provide professional design services and contracting to perform those services.⁶³ In *Seaview Hospital, Inc. v. Medicenters of America, Inc.*, a general contractor’s “turnkey” contract was held to have not violated Texas’s licensing laws (and was thus valid and enforceable), because it provided that the contractor would engage duly licensed architects and engineers to provide the required design services. 570 S.W.2d at 40.

The existing statutory framework in Texas suggests, however, a more complicated analysis would result if *Seaview* were decided today. Texas permits firms, partnerships, corporations, and associations to practice, or offer to practice architecture, only if any practice of architecture performed on behalf of the entity is performed by or through a person⁶⁴ registered as an architect.⁶⁵

⁵⁸ M.G.L.c. 112 § 81R(a).

⁵⁹ M.G.L.c. 112 § 60L(3).

⁶⁰ M.G.L.c. 143 § 54A.

⁶¹ See 780 Mass. Admin. Code § 107.6.

⁶² *Id.*

⁶³ See *e.g. Seaview Hospital, Inc. v. Medicenters of America, Inc.*, 570 S.W.2d 35, 39 (1978).

⁶⁴ Texas issues certificates of registration to practice architecture to individuals. 22 Tex. Admin. Code § 1.61.

⁶⁵ Tex. Occ. Code § 1051.701(b).

Statutes regarding the practice of engineering appear to be somewhat more restrictive. In particular, a regulation prohibits a business entity from not only performing engineering services, but also from offering to perform engineering services unless that entity is registered.⁶⁶ Whether a contract that results in the delegation of engineering design may be construed as an “offer” to perform engineering is an open question.

Additionally problematic is a prohibition against the receipt of any fee or compensation for engaging in the practice of engineering without a license to practice.⁶⁷ Which poses the question, would a contractor to whom design has been delegated violate this prohibition even if it retains a third-party engineer?

Concluding Thoughts

As a review of the existing industry contract language and existing statutes reveals, delegated design touches on many critical issues and how they are dealt with, if at all, is all over the map. The construction industry particularly, with its complex interdependent interrelationships, functions best when its participants have a common, accepted framework from which they understand their roles and responsibilities. As of now, the gap filler, if the gaps are being filled at all, are ad hoc contract provisions and specification sections. Often, the gaps are not addressed, leaving much opportunity for mis-steps and costly disputes. The leaders in the industry should work collaboratively to establish a more detailed, more effective framework for how design delegation is to best work in practice.

⁶⁶ 22 Tex. Admin. Code § 137.77(a). Please see also Tex. Occ. Code § 1001.405 which requires that a business entity (1) register, and (2) carry on its practice only with engineers. Please also see 22 Tex. Admin. Code § 137.51(d)’s prohibition against a “part-time arrangement” that would serve as a means to avoid the registration requirement of § 137.77.

⁶⁷ Tex. Occ. Code § 1001.301(d).