



A/E Risk Review brought to you by PLAN and:

Selvaggio, Teske & Associates

RISK MANAGEMENT PARTNERS FOR THE DESIGN AND BUILD INDUSTRY

Foreign Intrigue: Risks and Rewards of International Markets

*The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your unique circumstances. We'd like to thank XL Insurance – Design Professional for letting us adapt information from *The Contract Guide: A Risk Management Handbook for Architectural, Engineering and Environmental Professionals*.*

Design firms in the United States and Canada looking to expand their reach geographically often consider the possibility of providing services in foreign markets. In light of NAFTA, the European Economic Community and the opening of new Asian markets, many of these firms have found that entering foreign markets in the 21st Century is less daunting than in the past.

Still, many design firms have resisted the lure of foreign markets. In addition to the normal business concerns related to entering new territories, architects and engineers who provide services in foreign countries must face a host of unique demands. Language barriers, disparity in construction industry practices, variances in cultural and business customs, unfamiliar legal standards, and even novel contracting and pricing procedures all present great challenges to a design firm. And with the reality of the increased terrorist threat against Western businesses, many firms fear for the safety of employees who would work overseas.

The Liability Risks

Laws and industry customs vary widely from country to country. In some countries, the U.S.-style “standard of care” is unheard of. Instead, design firms are presumed liable whenever a defect in a structure becomes evident. The burden lies with the design firm to prove it is not responsible. (This is sometimes known as the “duty of result.”) Some countries even embrace the doctrine of strict liability for design professionals — that is, you are held responsible for a defect even if you are not negligent.

Even more confusing, the definition of “defect” can range from “unfit for intended purpose” in some countries to “a complete failure” in others. Similarly, the period during which an owner can claim compensation from a contractor or designer for that defect varies from six months in one country to 30 years in another. For example, most new roadwork in Europe has a 10-year liability period.

Consider these additional challenges associated with providing design services in foreign countries:

- The expenses of competing for work in an international market — including travel, housing, transportation, home leave and medical care — can be considerable.
- You may have to pay taxes both in the foreign country and in your home country.
- Political upheaval and other government instabilities can result in termination of contracts or seizure of assets.
- Failure to understand cultural subtleties in how to conduct business can result in losing a contract or fueling a project dispute.
- If you are not conversant in the local language, you are at the mercy of an interpreter who may not properly convey or translate important messages.
- Complying with local customs regarding payment practices may put you in danger of violating the United States' Foreign Corrupt Practices Act.

All the foregoing difficulties notwithstanding, international practices can be profitable and rewarding. Whether here or abroad, however, the basics of good business apply. You have to do your homework, find the right people with whom to partner, have the right legal and tax advice, negotiate a reasonable contract, and strive to solve problems at the earliest stage — before they reach litigation. Following are important areas to consider.

Choose Clients, Projects and Countries Carefully
Client and project selection is always important, but even more crucial when operating in a foreign country. What's more, you need to investigate the practices of the country as well as the individual client.

In the U.S., the Department of Commerce can provide information about a given country's business and payment practices. Look into the National Trade Data Bank from Commerce, which collects the federal government's offerings of information on international trade, export promotion, trade contacts, country profiles and other international economic data. Check with the Export-Import Bank and

providers such as Dun and Bradstreet to learn about a client's assets and credit rating. The ACEC, AIA and other industry associations can provide valuable information about country and client selection.

For all but low-risk projects, you may want to limit your liability by providing only "front-end" services on foreign projects. Consider working through the design-development phase and require the owner to hire a local design firm to do construction documents and construction-phase services. Key is to have a precise scope of services, with special attention given to defining your basic, additional and excluded services.

Seek Expert Legal Advice

Before you market your services abroad, consult with an attorney who is knowledgeable in international law regarding the design professions. Once you have begun preliminary negotiations with a potential foreign client, retain local counsel in that country as well. These lawyers will help you address special business issues such as how and in what currency you will be paid, repatriation of funds, tax considerations and possible protection in politically unstable situations.

Take on a Foreign Design Partner

To help overcome difficulties with cultural and business differences abroad, some firms choose to work with a design professional firm domiciled in the foreign country. In fact, some countries require this. Such a liaison is especially useful to unraveling unfamiliar building codes and construction practices.

Other U.S. and Canadian architects and engineers hire foreign designers to their staff to help them with the intricacies of shop drawing and submittal review. If you do affiliate with a local design firm, ascertain the amount and type of insurance it carries and address dispute resolution in your contract.

Establish Favorable Legal Jurisdiction

If your client or the project is in a country where the legal system is substantially different from that of the United States or Canada, specify in your contract the venue and governing law that will be applied to any claim. It is important to understand that a civil

judgment of a foreign court usually can be enforced against your home-based assets.

After consulting with your legal counsel, you may decide that the local laws of the country where the project or client is located would be preferable. Some countries, for instance, have laws regarding jobsite safety that completely protect the design professional. And in many places, limitation of a design professional's liability is an accepted standard contract provision. Most often, however, you should strive to negotiate a provision requiring that all disputes be heard and resolved under the applicable laws of the principal place of your business.

Another possibility is to specify that disputes will be governed by the laws of a neutral country, preferably one whose laws are based on the English Common Law. Recognize, however, that despite the venue and law you and your client decide upon for your disputes, that decision will not be binding upon third-party claims.

Get International Insurance

You'll want to protect your business and your assets through appropriate insurance coverage. Consultation with an insurance broker who is knowledgeable in international coverage is strongly advised.

Be aware that many insurance policies written in the United States, for example, are limited to providing coverage only in the U.S. and perhaps U.S. territories and Canada. If the job is in a country where coverage is not provided under your existing policies, separate foreign coverage insurance may be needed for workers compensation, general liability or automobile liability.

Professional liability (PL) policies often provide or can be endorsed to provide international or worldwide coverage. However, insurers differ on how PL coverage applies. Some provide coverage for claims brought anywhere in the world. Some exclude coverage in certain countries. Some require you to defend yourself and will reimburse you after the claim is resolved. Check with your PL insurance specialist to find out what coverage is available

under your insurance policies for any services you perform in foreign countries and what, if any, coverage gaps need to be filled.

Remember that it is crucial to review and negotiate the insurance terms of any contract before you sign it. Be sure you can obtain the required coverage, and know the costs of having special endorsements added to your policies. Often, foreign clients will withhold your fees until you provide the required insurance certificates. If you can't get an insurance certificate that reads exactly as your contract requires, your fees may be held up indefinitely.

Protect Your Employees

There is insurance available to help protect your employees as well as your firm. International workers compensation insurance for employees who are sent overseas is very much like 24-hour medical coverage. If an employee becomes ill or injured while on assignment abroad, it might be claimed that he or she was in that country because of work and, therefore, the illness or injury was work connected. This insurance also covers the cost to transport sick or injured U.S. employees home or to a third country to obtain necessary emergency treatment.

In light of today's increased terrorist and extortion threat, you should consider kidnap and ransom insurance policies. These policies generally cover losses incurred by paying the ransom, the hostage's salary while he or she is held captive, as well as other costs associated with a kidnapping, including payment of security company fees. Equally important, kidnap and ransom insurance programs often provide invaluable information regarding relative risks by country, as well as tips for employees to decrease the chances of being abducted or targeted for violence. Finally, for security purposes, this type of coverage should be purchased quietly. The fewer who know about the coverage, the better.

Conclusion

Moving to the international market can present attractive growth opportunities. However, these opportunities are not without their challenges. Seek

expert assistance before venturing overseas and talk to a knowledgeable insurance agent or broker who can help you mitigate the added risks.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures.

Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN).

We're here to help.