

A/E RISK REVIEW

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Foreign Projects Bring Both Opportunities, Challenges

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 own unique circumstances.

Design firms looking to expand their market base often consider providing services in foreign markets. In light of NAFTA, the European Economic Community and the burgeoning markets in China, India and other fast-growth countries, an increasing number of firms have found that entering foreign markets is a lucrative option.

Still, many obstacles exist. In addition to the business concerns related to entering new territories, architects and engineers who provide services in foreign countries face a host of unique demands. Language barriers, disparities in design and construction industry practices, variances in cultural and business customs, unfamiliar legal standards, and even unusual contracting, licensing 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 and subconsultants working overseas.

The Considerable Risks

Laws and customs vary widely from nation to nation. This holds true in regard to professional liability and other risks. In some countries, design professionals are presumed liable whenever there is a defect in a structure. The burden lies with the design firm to prove it is not responsible. (This is sometimes known as the "duty of result" – a criterion much stricter than our

familiar "standard of care.") Other nations embrace the doctrine of strict liability wherein design professionals can be held responsible for a defect even if they are not found negligent. What's more, design firms can be held liable for their work 10, 20 even 30 years into the future.

A design professional's risks go beyond professional liability. Consider these additional challenges associated with providing design services in foreign countries:

There are added expenses when competing for work in an international market. These costs can include government fees, duplicate office expenses, travel, housing, transportation, translators, home leave and medical care.

You may find it more difficult to get paid, or you could lose money in currency transactions.

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 information.

Complying with local customs regarding payment practices may put you in danger of violating the United States' Foreign Corrupt Practices Act.

Kidnapping, extortion and assault can occur in countries where certain factions are unfriendly to western business.

Despite all of these added risks, foreign projects can be profitable and rewarding. The key – as with domestic projects – is to adhere to smart business practices. You

have to do your homework. Important steps include choosing clients and projects carefully, getting expert legal and tax advice, negotiating reasonable contracts, and striving to solve disputes at the earliest stage – before they reach litigation. Following are 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 and the Department of State can provide invaluable information about a given country's business and payment practices. The National Trade Data Bank collects 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 potential client's assets and credit rating. The ACEC, AIA and other industry associations can provide valuable information about operating overseas (building codes, required licenses and certifications, standards of care, etc.) as well as country and client selection.

Finally, turn to fellow design professionals who have worked on projects overseas. First-hand accounts of recent experiences in foreign countries can provide inside information you may not get from a government source.

Get Expert Legal and Tax Advice

Before you market your services abroad, consult with an attorney and accountant knowledgeable in international law and commerce regarding the design and construction professions. Again, industry associations may prove helpful in providing references, or ask your own legal and tax advisors for recommendations.

Once you have begun preliminary negotiations with a potential foreign client, you may want to retain legal and economic counsel in that country as well. These attorneys and accountants can 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.

Regardless of what legal and tax advice you obtain, insist that any business contract you are asked to sign is in English.

Take on a Foreign Design Partner

To help overcome difficulties with cultural and business differences abroad, many firms choose to work with a design professional firm domiciled in the foreign country. In fact, some countries require that you work with one of their design firms. Such a liaison can be extremely helpful in unraveling unfamiliar building codes and construction practices. 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.

Rather than partnering with a foreign design firm, you may decide to hire foreign designers to your staff (or as subconsultants) on a temporary basis. These designers can help with the intricacies of shop drawing and submittal review, often at a very reasonable cost.

Establish Favorable Legal Jurisdiction

When working in a foreign country it is imperative to establish the jurisdiction in which a lawsuit or other dispute resolution technique will be held. Consider what conventions and treaties apply – these may specify how legal disputes will be handled.

In most cases, it is favorable to have any disputes settled per the laws of your home country. But in some instances, the local laws of the foreign country where the project or client is located would be preferable, or at least acceptable. Some countries have stricter limitations on a design professional's liability; others may eliminate a design firm's potential liability for issues such as jobsite safety altogether. Another possibility is to specify that disputes will be governed by the laws of a neutral third country.

Expert legal advice is crucial to making the correct choice of jurisdiction. Recognize, however, that regardless of the venue you and your client decide upon, that decision likely will not be binding upon any third-party disputes. These will most likely fall under the jurisdiction of the host country. Also, under the principle of comity, most countries will enforce a judgment rendered in another nation.

Get International Insurance

You'll want to protect your business, employees and assets through appropriate international insurance coverage. Be aware that many insurance policies written in the United States and Canada are limited to providing coverage only in those countries and their territories and commonwealths. If your project is in a country where coverage is not provided under your existing insurance policies, separate international coverage is likely needed for risks such as 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. Others exclude coverage in certain countries. Still others may require you to defend yourself and will reimburse you for expenses after the claim is resolved.

To help protect your employees working overseas, you'll likely need international workers compensation insurance. This 24-hour per day coverage is often needed to supplement domestic workers compensation and health care coverage. If an employee becomes ill or is injured while on assignment abroad, it might be claimed by the health care insurer that he or she was in that country because of work and, therefore, the illness or injury was work connected. Conversely, if an overseas worker is injured or killed after hours, a domestic workers compensation insurer may deny coverage as not work-related. International workers compensation insurance can fill these gaps and also cover 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 seriously consider kidnap and ransom insurance. 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.

Remember 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 before agreeing to insurance requirements. Often, foreign clients will withhold your fees until you provide the required insurance certificates.

As your PLAN agency, we can help you find out what foreign coverage is available under your existing insurance policies and what, if any, coverage gaps need to be filled.

Conclusion

Moving to the international arena can present attractive growth opportunities. However, these opportunities are not without their challenges. Seek expert assistance before venturing overseas and work with a knowledgeable attorney, accountant and insurance agent or broker who can help you mitigate the added risks.

You may want to take baby steps before diving fully into foreign projects. Some design firms begin their international work by providing limited services as a subconsultant to a domestic design firm with experience working on foreign projects. This can provide the opportunity to work in a foreign country on a trial basis while learning from an experienced firm before jumping in with both feet.

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.