

# Reducing Potential Liability in Emergency Response

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Architects and engineers have become more reluctant to render services over the last 20+ years in response to disaster emergencies out of fear of liability exposure. Before doing so, A/E professionals should ensure that their actions do not present a liability disaster to themselves and their firms. This article briefly reviews lessons learned in the aftermath of emergency responses by the A/E community and addresses ways that A/E professionals can manage risk to continue providing vital emergency response services.

## Lessons Learned

The scores of architects and engineers that have been called upon to respond to disasters – such as the World Trade Center terrorist attacks, hurricanes Ivan, Katrina, Sandy, and Maria, and several earthquakes – have, unfortunately, been exposed to varying degrees of liability in providing their well-intentioned emergency services.

In response to the WTC disaster in New York, A/E professionals were retained to analyze the stability of impacted buildings and debris piles to facilitate recovery and cleanup efforts by the emergency responders, many of whom fell ill due to exposure to various toxins during these efforts. To their surprise, the A/E professionals found themselves engulfed in multi-year litigations filed by the responders who claimed that the involved professionals were responsible for their safety. After many years of litigation, the claims against these professionals were ultimately dismissed. Since then, despite being “victorious” (years of litigation is not victorious to anyone), A/E professionals have hesitated to respond to subsequent disasters such as earthquakes and hurricanes.

A/E professionals should be able to respond to emergencies without fear of placing themselves or their firms at risk. While Good Samaritan laws may provide some protection (for purposes of this article, these laws refer to statutes that provide certain liability protections and/or immunity to A/E professionals performing emergency services in disaster response situations), these laws are not perfect or consistent across jurisdictions. Also, design professionals face the same liability for the services they provide – whether they are compensated or volunteer to provide them pro bono.

## Limiting Liability Exposure

A/E professionals can effectively reduce their liability exposure by including the following

provisions in their agreements and/or waivers for the emergency services. Note that while these provisions may reduce risk with their contracting party, they may not guard against potential liability to third parties such as a member of the public.

**1) Scope of Services and Standard of Care.** A well-defined and narrow scope of services should be included that states the services are being rendered on an emergency (and not-comprehensive) basis. Services not being rendered should be excluded (e.g., site safety, environmental, health-related, air quality, inspection, or protection services). In addition, the standard of care should be that of an A/E professional performing emergency services under similar circumstances in the applicable jurisdiction and under a compressed schedule.

**2) No Responsibility for Means and Methods of Construction or Safety.** Including a provision that confirms that the A/E professionals are not responsible for site safety, the means and methods of the emergency work, or other factors relating to the project (environmental, air quality, protections, etc.) can help to make frivolous litigations infinitely less costly (stating this in the contract may help the A/E professional obtain an early dismissal from the litigation). Of course, this requires design professionals to ensure that their services do not run afoul of the terms of these provisions.

**3) Limitations of Liability.** Suppose A/E professionals are providing disaster response services free of charge. In that case, they should still attempt to limit their liability to the available insurance covering the services – to the extent its insurer provides coverage for such pro bono work. If compensated for the services, they should try to limit their liability to the lesser of (i) the amount of its fees under the contract or (ii) the available insurance proceeds. Again, as mentioned above, while limitations of liability are valuable to reduce risk exposure with the contracting party, they may not reduce risk exposure to non-contracting parties such as the general public.

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## 4) No Liability for Consequential Damages.

Including a waiver of consequential damages can shield A/E professionals from being exposed to remote – and potentially high – contractual damages, such as lost profits and loss-of-use damages of the contracting party. However, as with the limitations of liability provisions, this provision would not apply to claims by non-contracting parties.

**5) Indemnity.** Indemnity provisions are crucial to hold harmless, defend, and indemnify the A/E professional from third-party claims (claims from persons or entities who are not parties to the contract), including those arising from personal injuries or property damage. A properly drafted indemnity provision should also include reimbursement of reasonable attorneys’ fees for the counsel of the A/E professional’s choice.

## Conclusion

Providing design services in disaster response situations can be a significant risk to architects and engineers. Including the above-referenced contractual provisions can help reduce risk and enable A/E professionals to continue to provide vital emergency responses. However, given the potential risk exposure to third-parties, A/E professionals would be well-advised to provide emergency response services with the same care and diligence as they would for their best corporate client. ■



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