



The XL Insurance Contract Guide for Design Professionals

A RISK MANAGEMENT HANDBOOK
FOR ARCHITECTS AND ENGINEERS

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Building Commissioning

At its most basic, building commissioning, often abbreviated as Cx, might be defined as a process to help assure that building systems are designed, installed, tested and able to be operated and maintained according to the owner's needs.¹ Initially, Cx focused on mechanical and electrical systems but now often includes many other building systems, such as the envelope systems, interior finishes and life safety. The benefits of commissioning are reported to include a higher quality building, fewer construction delays, less RFIs and change orders, enhanced project communications and documentation, and reduced claims.

Each project differs, but typically a building owner retains a *commissioning agent or authority (CxA)* to help:

- Create procedures to confirm and provide documentation that the performance of the facility and its systems meet the owner's requirements.
- Improve communication by documenting data and decisions throughout the design, construction and start-up phases of the project.
- Assure that the building system's performance meets design and project intent.

Note that commissioning is not about *inspection*. By most definitions, the CxA's role is not to find mistakes but to evaluate the project team's processes to determine if the owner's project intent is being achieved.

Although commissioning is most effective when initiated at the project's planning stage, it can be instituted any time. Design-through-occupancy, post-construction and recommissioning are the three most common starting points.

Commissioning is quickly gaining acceptance throughout the construction industry. Under the Leadership in Energy and Environmental Design (LEED®) Green Building Rating System™ version 2.2, for example, the commissioning of all building energy systems is a prerequisite. And all new GSA construction and modernization projects must employ a building commissioning process as well as achieve LEED certification with a target of a LEED silver rating. (See **Sustainability and Green Design.**)

¹ The National Conference on Building Commissioning has established an official definition of Total Building Commissioning as a "systematic process of assuring by verification and documentation, from the design phase to a minimum of one year after construction, that all facility systems perform interactively in accordance with the design documentation and intent, and in accordance with the owner's operational needs, including preparation of operation personnel."
GSA Public Buildings Services, *The Building Commissioning Guide* (Washington, DC: U.S. General Services Administration, 2005). Available online at www.gsa.gov.

THE PROBLEM

To date, few claims against architects and engineers have been associated with commissioning. It's a relatively new process, however, and anything unfamiliar warrants extra caution until the claim environment develops and is understood.

As with any new process, people may be offering services as CxAs without the necessary qualifications. Also, clients may not understand that these services are not part of your usual scope of services but are additional services to be provided by you or someone else... and that these additional services need to be paid for. Clients may also not comprehend the scope and intent of commissioning. They may mistakenly believe that commissioning might actually serve as a guarantee of a certain result, such as a LEED certification or the attainment of certain savings in energy costs. (Indeed, in its official definition, the National Conference on Building Commissioning uses the word *verification*, a term that may serve to raise owner expectations and unintentionally elevate the standard of care.²)

Finally, there are real differences of opinion as to the scope of commissioning services—and who should provide them. Independent third-party CxAs are the most common providers of commissioning services. The Building Commissioning Association (BCA) believes that the CxA should be an advocate of the owner. If the CxA's firm has other project responsibilities or is not directly responsible to the owner, the BCA says, a conflict of interest may exist. On the other hand, others feel that a client is best served when the commissioning services are provided by the person who designed the project. After all, the thinking goes, who knows the design intent—and the building—better? To that end, The AIA published the B211, a commissioning scope of services document in which the architect manages the commissioning process.

THE SOLUTION

If you are providing or thinking about providing commissioning services:

- Don't offer commissioning services unless you have the qualified staff and expertise to do so.
- Don't certify or warrant anything. The job of the CxA is to *enable*, not to promise. (See **Certifications, Guarantees and Warranties** for more information.) In addition, avoid the word *verify*.
- Insist on a good contract and a well-defined scope of services that sets forth the services you will and won't provide. (See **Scope of Services**.)

If your firm is performing commissioning as a stand-alone service, you will want contractual protection (both a waiver and indemnity) for liability arising out of the design and construction-phase services provided by others. In addition, we recommend that you include a Limitation of Liability provision as well as a clause to protect you from flawed information given to you by the original designer or the owner. (See **Indemnities, Information Provided by Others** and **Limitation of Liability** for more information.) Here is a starting point:

² Ibid.

COMMISSIONING

In consideration of the Consultant performing a Commissioning review of the Project, the Client agrees that the Consultant shall be entitled to rely upon the completeness and accuracy of all information provided by the Client to the Consultant. The Client further agrees that the Consultant shall not be responsible in any way for errors or omissions contained in any drawings or specifications prepared by others or for errors or omissions by others in incorporating the Consultant's recommendations into the reports, drawings or specifications. In addition, the Client agrees to waive all claims against the Consultant arising from the services performed by others on the Project or from the services to be provided by the Consultant under this Agreement, except for the sole negligence or willful misconduct of the Consultant.

In addition, the Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant from all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising or allegedly arising from the services performed by others on the Project or from the services provided by the Consultant under this Agreement, except for the sole negligence or willful misconduct of the Consultant.

Remember that if you are the commissioning agent, it is not your role to make the design changes; your task is to furnish recommendations. It is important that the design architect or engineer review your recommendations and have an opportunity to respond. All final decisions about redesign must be made by the owner and agreed to and incorporated in the documents by the original designer of record—after all the alternatives have been discussed and the impact of any changes carefully considered. Talk to your attorney. If you are acting in the role of CxA, your contract must make clear that you are neither responsible nor liable for the final design decisions and their incorporation into the documents.

On the other hand, if you are designing a project that is going to involve commissioning, you will probably be required to spend more staff time on documentation, meetings and testing. Make sure you anticipate those hours in your fee.

Develop a clear understanding with your client on the extent of your obligations to redesign in order to accommodate any client decisions based on commissioning. Your contract should include a provision

that limits responsibility for redesign and gives you the ability to object to the recommendations of the commissioning agent. Since each project varies, you and your attorney should tailor your provision to reflect your specific project. Consider:

COMMISSIONING

If the Client retains the services of a Commissioning Agent (CxA) to review the plans prepared by the Consultant, those services shall be at the Client's sole expense and shall be performed in a timely manner so as not to delay the orderly progress of the Consultant's services. The Client shall promptly notify the Consultant of the identity of the CxA and shall define the CxA's scope of services. All recommendations of the CxA shall be given to the Consultant for review, and adequate time will be provided for the Consultant to respond to these recommendations.

If the Consultant objects to any recommendations made by the CxA, it shall so state in writing to the Client, along with the reasons for objecting. If the Client, in spite of the Consultant's objections, requires the incorporation of changes in the Construction Documents, the Client agrees, to the fullest extent permitted by law, to waive all claims against the Consultant and to indemnify and hold harmless the Consultant from any damages, liabilities or costs, including reasonable attorneys' fees and costs of defense, which arise in connection with or as a result of the incorporation of such design changes required by the Client.

The Consultant shall be compensated as Additional Service for all time spent to prepare for, review and respond to the recommendations of the CxA and to incorporate recommended commissioning changes into reports, drawings, specifications, bidding or other documents. The Consultant's time for performance of those services shall be equitably adjusted.

As commissioning evolves, it may indeed serve to fill the gaps that often exist between design and project start-up. Participating in the commissioning process offers unique opportunities to assist in the timely identification and resolution of problems that may otherwise result in client dissatisfaction and claims. And as long as the emphasis remains on quality, communication and documentation, the process can be a means to help prevent claims.

SEE ALSO

Certifications, Guarantees and Warranties

Indemnities

Information Provided by Others

Jobsite Safety

Limitation of Liability

Scope of Services

Sustainability and Green Design