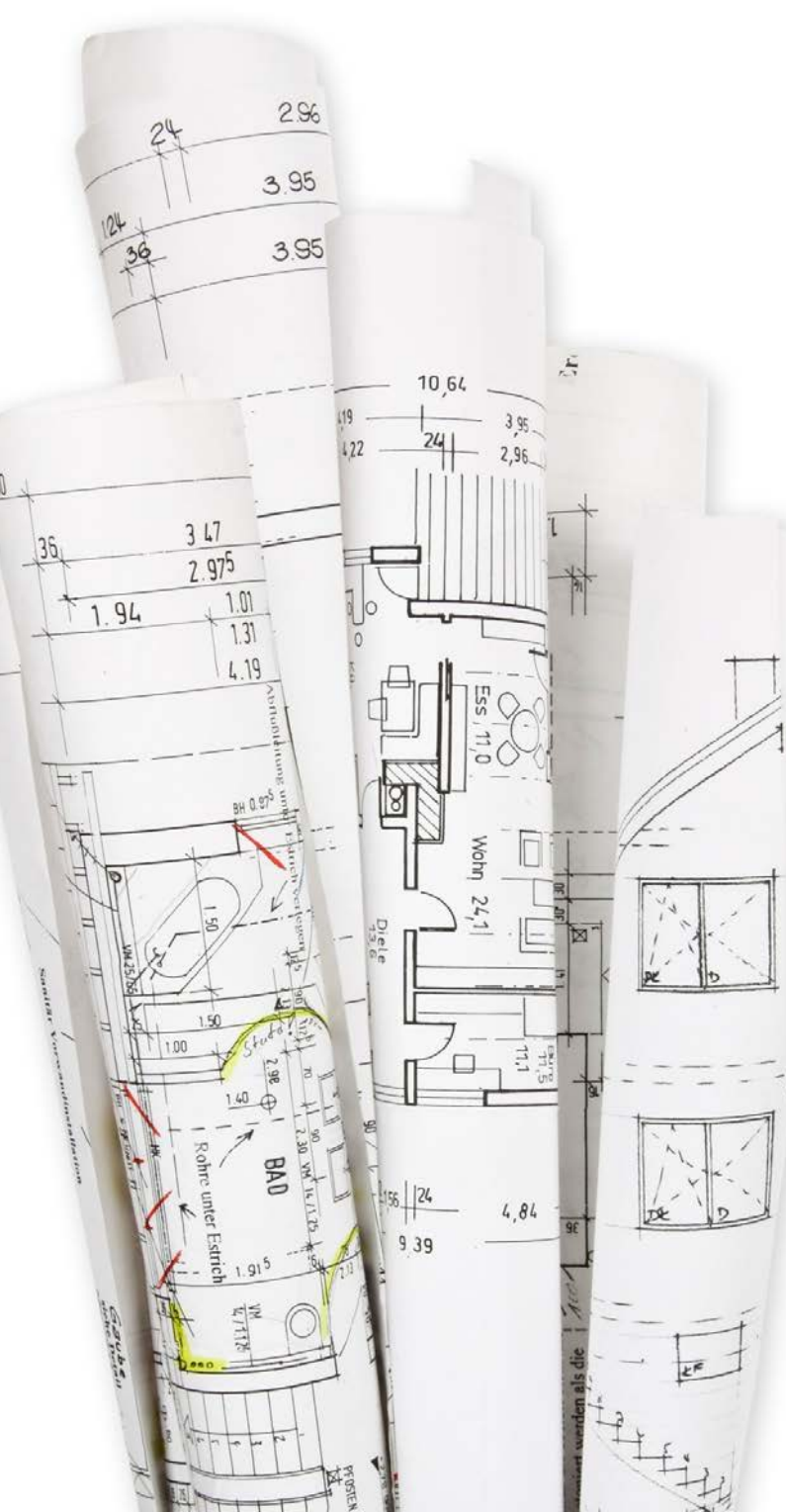


# BUILDING BLOCKS

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## A/E's Responsibility for Determining Non-Conforming and Defective Construction Work

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We would like to think that a construction contractor's work meets all of the requirements of a design on every project, but that does not always happen. Architects and engineers (A/E's) can include in their scope of services the responsibility of construction contract administration to include project site reviews, to determine if the work is in general conformance with the design intent. In fact, it is highly advisable that A/E's provide construction administration in their agreements with their clients, which results in better satisfaction for all the project team members. Nonetheless, despite their reasonable efforts, A/E's cannot force a contractor to complete their work properly if their work is defective or non-conforming with the project requirements.

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## OPTIONS IF THE A/E DETERMINES THAT WORK IS DEFECTIVE

- The project owner may accept the defective work and seek a change order for deduction of money. The amount of the deduction would be negotiated between the owner, contractor and the design professionals involved. One benefit of this option is the ability to keep the project on schedule if the owner can accept the defective work.
- The A/E may direct the work to be removed, and reinstalled. This remedy may not only delay the completion of the project but can cause a dispute with the contractor.
- If the contractor refuses to correct the work, the project owner can terminate the construction contract and file legal remedies for breach of contract with dispute resolution specified in their agreement.
- Some states have what is called “correction period” for a set length of time after project completion, which allows the owner to request the contractor to fix the defective work. This period is distinct from a warranty and focuses on the contractor's obligation to repair the work during that time, rather than a broader and lengthy warranty period. If the owner identifies defects during this period, they must notify the contractor and give them an opportunity to make the repairs. Failure to do so can waive the owner's right to have the contractor correct the defective work.
- It goes without saying, the wisdom is that addressing defective work promptly can prevent further damage to the property and potential safety hazards, and result in a favorable project completion.

The American Institute of Architects, the General Conditions of the Contract for Construction, AIA A201, Article 12.2, separates the correction of work into two categories:

### Before Substantial Completion

If the architect rejects work by the contractor or the work fails to conform with contract documents, the contractor is obligated to promptly correct such work. The costs for correcting the work are the contractor's responsibility. These costs can include additional testing and inspections, uncovering or removing the defective work, and compensation for the architect's services.

### After Substantial Completion

This period lasts one year following substantial completion after the date for the commencement of warranties established by the construction agreement. If the owner discovers work that is not in compliance with the contract documents during this period, the owner is required to notify the contractor. Notification of the defect during the one-year period obligates the contractor to promptly correct it. The only exception to this exists if the owner has previously given the contractor written acceptance of the claimed defect. If the owner identifies a defect needing correction during the one-year period but fails to notify the contractor and give the contractor an opportunity to correct it, the owner loses the right to have the contractor correct it. Additionally, the owner also waives the right to make a claim for breach of warranty against the contractor.

## CRITERIA DETERMINING THAT WORK IS IN CONFORMANCE OR DEFECTIVE

During project site visits, A/Es review their construction contractor's work to determine if the installation meets certain tolerances. For example, The Gypsum Association defines five levels of drywall finishes, ranging from Level 0 (no finishing) to Level 5 (completely smooth and uniform). Depending on the project type and the A/E's client's requirements, site visits need to determine if the wall meets the project's requirements with various methods such as a laser level plus a discerning eye.

Level 5 installations include high-end projects, luxury residences, upscale hotels, premium office spaces, and areas with significant visual demands. These walls require an additional skim coat of gypsum to reach smoothness and uniformity. Obviously, those installations are most costly. For most installations, the industry standard for flatness in gypsum board finishing is generally an 1/8 inch variation over a 10-foot span (Level 3 or 4).

## IN CONCLUSION

The obligation for the remediation of poorly done work is part of the construction contract. A well-written contract will allow the owner to reject work for failing to meet contractual obligations. The contract should

also include the requirements for fixing the work. If either non-conforming or defective work is present with input from the A/E at the final inspection, the contractor has a legal obligation to correct the problem based on the terms of the contract.

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### ***About the Author of this Risk Management Building Block Article***

*As a risk manager for the last 20 years for the design profession, Eric O. Pempus, FAIA, Esq., NCARB has experience in professional liability insurance and claims, architecture, engineering, land use, law, and a unique background in the construction industry. Prior to risk management, he has 25 years of experience in the practice of architecture/engineering, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 37 years at Kent State University's College of Architecture & Environmental Design.*

*As a Fellow of the American Institute of Architects and AIA National Ethics Council 2021 Chair, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals since 2000 on topics of ethics, contracts, and professional practice in various venues across the United States and Canada. He is a former member and chair of his city's Board of Zoning & Building Appeals for 24 years, and is a licensed architect, attorney, and property & casualty insurance professional.*

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*The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities and should not be construed to represent a determination of legal issues but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.*

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