



SPECIAL INSPECTIONS PRESENT SPECIAL ISSUES FOR DESIGN PROFESSIONALS

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Many design professionals have performed special inspections over the years, certifying the inspections on a TR-1 Statement of Responsibility form (TR-1). Prior to May 2013, there were no specific requirements that the design professional needed to meet to perform special inspections other than to be a licensed architect or engineer qualified to perform such inspections. However, that all changed as a result of 1 RCNY §101-06 and Executive Order 4/12 which now requires the design professional to be registered and accredited with the Department of Buildings (DOB). This requirement went into effect on May 13, 2013. Accordingly, from that time on, special inspections are only permitted to be performed by a registered special inspection agency. Further, only Directors of a special inspection agency may submit the TR-1.

The Administrative Code prohibits individuals from knowingly, or negligently, making a false statement to the DOB. As a result, claims may be filed against a design professional for:

knowingly or negligently making a material false statement, or knowingly or negligently falsifying or allowing to be falsified a certificate, form, signed statement, application, report or certification of the correction of a violation, required under the provisions of the Building Code or a rule of the NYC DOB in violation of NYC Admin Code §28-211.1

Based on the requirements set forth by the DOB, as of May 13, 2013, sanctions may be imposed on the design professional if it performs special inspections without the proper registration and certification. Pursuant to Administrative Code §28-211.1, the sanctions against a design professional may include: a) removing

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the design professional's right to perform self-certifications; b) prohibiting the design professional from performing special inspections or, more dramatically; c) taking away the design professional's right to file any documents in all five boroughs of New York City. Clearly, the final sanction is the most severe and often results in a design professional arguing in its defense that such a sanction can effectively put the design professional out of business.

In addition to being properly registered and accredited to perform special inspections, the NYS Education Law requires that the design professional's business be in the proper corporate form in order to perform such services. Therefore, even if the design professional has been properly registered and accredited to perform special inspections, if it is not in the proper corporate form sanctions may be imposed. Proper corporate forms include:

1. Sole proprietorships (Certificate of Authorization is optional);
2. Domestic professional service corporation;
3. Domestic design professional service corporation;
4. Foreign professional service corporation;
5. Domestic and foreign professional service limited liability company;
6. Professional partnerships;
7. Registered limited liability partnership;
8. Foreign registered limited liability partnerships; and
9. "Grandfathered" general business corporations under §7209

The Office of Professional Discipline (OPD) which investigates and prosecutes claims of professional misconduct against design professionals, or the Office of Administrative Trials and Hearings (OATH) which is an enforcement arm of the DOB, may contact the design professional requiring the design professional to appear before the OPD or the DOB to address such claims.

The requirements set forth by the DOB with respect to the right to perform special inspections is taken quite seriously by the DOB and were designed, in part, to protect the public from design professionals who may not be fully qualified to perform this important service. The areas encompassing these inspections often involve life/safety components of a project. As such, according to the Administrative Code, sanctions may be imposed if the design professional performs such services either knowingly or negligently. The DOB, OPD, and OATH are not generally swayed by explanations, excuses, or justifications for failing to comply with these requirements set forth in the Administrative Code.

The design professional may decide to fight the charges set forth against it by the DOB at a hearing. If the hearing proves unsuccessful to the design professional, the design professional may then proceed to an Article 78 Proceeding in the State Supreme Court. During the Article 78 proceeding, the design professional may argue that, despite violation of the Administrative Code, the punishment is too extreme. Specifically, the design professional may argue that indefinite revocation of a design professional's right to file any documents in the five boroughs of New York City may result in the design professional being put out of business. While nothing precludes the design professional from attempting to have its filing privileges reinstated at a later date, there is no guarantee or promises made by the DOB that reinstatement will be granted.

CONCLUSION

Failure to properly plan before performing special inspections may result in a devastating impact on the design professional's livelihood. The penalties for a design professional performing special inspections when it is not in the proper business form and has not been properly registered and accredited are severe. While the design professional may proceed to a hearing or State Court proceeding to fight the charges, this often proves to be an uphill battle with no guarantee of success. Unless the charges are dropped, in most instances they are resolved through settlement. Therefore, before performing such services, a design professional should seek the advice of legal counsel well-versed in this area in order to protect its interests against such claims. Legal counsel can be of assistance in the formation of the proper business entity, making certain the necessary steps are followed to obtain the appropriate registration and certification and, if necessary, perhaps negotiating a lesser sanction should a claim ultimately be pursued by the DOB.

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