

MANAGING

CONSTRUCTION PHASE

PROFESSIONAL SERVICES RISKS



UNIVERSITY

WEBINAR

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at 3PM ET**



Presenter:

J. Kent Holland, J.D.
ConstructionRisk, LLC



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Today's Agenda

- PUA Overview
- Overview: Construction Phase Risks
- Communicate & Document
- Jobsite Safety
- Site Observation
- Requests for Information
- Shop Drawing Reviews
- Change Order Reviews
- Certifications
- Questions

1

PUA Overview

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- A&E
- Design-build contractors
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Learning Objectives

- Learn to manage key risks arising during construction phase professional services – starting with obtaining reasonable contract language
- Identify and manage risks from:
 - Request for information
 - Shop drawing reviews
 - Change order reviews
 - Site visits for monitoring an observing contractor's work
- Learn to address risks from various types of certifications including payment, final completion, contractor compliance, and lenders
- Identify and manage risks arising from evaluating contractor performance and from job site safety



2

Overview: Construction Phase Risks

Understand Your Duties: Read the Contract

- Construction contract sets the contractor's (KR's) expectations and legal entitlement
- Design services contract sets the DP's obligations, but...
- DP's services described in construction contract may be incorporated into DP's contract or otherwise relied upon by KR

§ 3.6.1.1 The Architect shall provide administration of the Contract between the Owner and the Contractor as set forth below **and in AIA Document A201™–2017, General Conditions of the Contract for Construction**. If the Owner and Contractor modify AIA Document A201–2017, those modifications shall not affect the Architect's services under this Agreement unless the Owner and the Architect amend this Agreement.

- AIA B101-2017

Typical Design Professional's Construction Phase Services

- Review shop drawing submittals
- Respond to Requests for Information (RFI)
- Observe/reject contractor's work
- Certify payment
- Inspection for substantial and final completion
- Changes/claims:
 - Authorize minor changes
 - Evaluate change requests/issue change orders
 - Evaluate claims
- Avoid jobsite safety responsibilities



The Potential Liabilities

- Contractor claims that DP adversely impacted its performance and costs
- Client claims that DP adversely impacted project (schedule and costs)
- Failing to report to the client the defective work by contractor
- Jobsite safety



Who Might Make a Claim?

Clients (those in contract with DP)

- Owner
- Design-builder
- Prime design Professional

Third Parties (not in contract)

- Construction contractors, subcontractors, suppliers
- Construction laborers, site visitors, lenders, sureties

Users of Completed Design

- Building visitors, officer workers
- Pedestrians
- Drivers

When Do Claims Arise?

1. Contractor submits change orders claiming increased costs due to:
 - Defective Drawings & Specifications
 - Delay
 - Design changes during construction

- Owner requires that DP assume liability for these change orders
 - May deduct amounts from payments to DP
2. Owner alleges defective certificates for payment
3. Third party is injured due to alleged design error/omission

The Standard of Care

Courts hold that:

“In the absence of special terms & conditions such as guarantees, warranties, and standards of care, the A/E does not expressly or impliedly guarantee a perfect plan or satisfactory result. Liability rests upon unskillfulness or negligence and not upon mere errors of judgment.”

“Consultant will perform its services using that degree of care and skill ordinarily exercised under similar conditions by professional consultants practicing at the same time in the same or similar locality.”

- Expert testimony required as evidence regarding:
 - The applicable standard of care
 - Design professional’s failure to comply
- No negligence can be found without a breach of the professional standard of care

3

Communicate & Document

Communicating Clearly, Promptly and to the Right People



Negotiating the contract:
Set reasonable expectations



Don't promise too much,
or do more than contractually required



Do what was promised



Document in writing its advice and communications with client

Documenting the Progress

- Project websites
- BIM models
- Meeting Minutes
- Reports
- Email
- Logs of RFIs and changes
- Photos
- Videos



4

Jobsite Safety

Site Safety: Who Is Responsible?

- Site safety is primarily responsibility of the construction contractor
- The design professional's contract with the owner should state that the design professional is not responsible for site safety, and that the contractor has sole responsibility for safety
- Design professional's activities in the field should mirror the limitations in the contract



Design Professional Jobsite Responsibility

- Design professionals and professional consultants need to take precautions against accepting responsibility for the safety of anyone other than their own employees
- Numerous court decisions have addressed the question of whether a firm such as an architect, engineer or CM has liability for someone else's employee despite not being directly or even indirectly responsible for causing the injuries
- The key questions addressed by courts are whether:
 - The contract between the consultant and the project owner established consultant safety responsibilities
 - Did the consultant do anything in the field during construction to take on responsibility site safety despite contracts stating otherwise?

Design Professional Site Safety Basics

- Design professional's (DP's) contract with the owner should expressly state the limitations of DP's role concerning jobsite safety responsibility
- In-field activities must mirror whatever limitations are contained in the contract
- If the contract language clearly states that the consultant has no responsibility for project site safety and the contractor is solely responsible (e.g., AIA B 101-2017, § 3.6.1.2 and AIA A 201-2017, § 4.2.2), the court will not stop there with its analysis

When Liable to Third Parties

- When is the consultant liable to third parties for injuries on a construction project?
 - Courts first look to contract to see if it imposes duty or if it might even contain language expressly disavowing site safety responsibility
 - Even if contract does not create duty, the consultant could assume duty by its actions on the job site

Did the consultant tell contractor what to do?

Did the consultant see dangerous conditions and ignore them?

Factors Considered by Courts

1. Actual supervision and control of the work by A/E
2. Retention of the right to supervise and control
3. Constant participation in ongoing construction activities
4. Supervision and coordination of subcontractors
5. Assumption of responsibility for safety practices
6. Authority to issue change orders
7. The right to stop the work



Do Not Supervise the Work

“The supervision of safety is encompassed in the duty to supervise, and no separate agreement to supervise safety is necessary where the architect is supervising the details of every other aspect of the project.”

— McKean v. Yates Engineering Corp., 200 So. 3d 431 (Mississippi 2016)

CM Not Responsible for Jobsite Safety

- In *Hunt Construction Group, Inc. v. Garrett*, a subcontractor sued Hunt, the CM, alleging it had a legal duty of care for jobsite-employee safety
- No liability says the court because:

“First, the CM contract itself did not specify that the CM had any responsibility for safety whatsoever.

Second, counterpart construction contracts signed by the contractors and subcontractors indicated that they had responsibility for project safety and the safety of their employees.

Third, those contracts expressly disclaimed any direct or indirect responsibility on the part of the CM for project safety.”

CM Not Responsible for Jobsite Safety (cont.)

- In this case, even though the CM participated in site safety meetings and issued site safety reports and did other safety-related activities, the court found that all of these were within the scope of the contractually-agreed upon services that performed strictly for the benefit of the owner-client and not for the benefit of employees of any of the contractors

This seems to be the key in many of these decisions – which the contract and actions in the field demonstrate that the CM was only serving the interests of its client and not anyone else

Airport Example: Architect Found Liable

- Airport maintenance person electrocuted while attempting to repair electrical transformer that lacked required wiring diagrams and warning signs
- Architect found liable because electric switchgear box lacked warning labels
- DP was subject to liability because failed to report to owner that contractor did not complete punch list items that included placing wiring diagram inside transformer and certain other issues

- *LeBlanc v. Logan Hilton*

5

Site Observation

Site Observation: Don't Endeavor to Guard

- In 2007 the AIA deleted the phrase, **“to endeavor to guard the owner against defects and deficiencies in the work”**
 - Many clients put these words back in — take them out!
- “Endeavor to guard” encourages claims regarding construction defects that are not detected
- **Instead: Report to the Owner**
 1. Known deviations from the contract documents and from the most recent construction schedule submitted by the contractor
 2. Defects and deficiencies observed in the work

Site Observation: Purpose

“The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.3.3, to become ***generally familiar*** with the progress and quality of the portion of the Work completed, and to ***determine, in general***, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the **Architect shall not be required to make exhaustive or continuous on-site inspections** to check the quality or quantity of the Work. On the basis of the site visits, the Architect shall keep the Owner ***reasonably informed*** about the progress and quality of the portion of the Work completed, and promptly **report to the Owner** (1) ***known deviations*** from the Contract Documents (2) ***known deviations*** from the most recent construction schedule submitted by the Contractor, and (3) **defects and deficiencies observed** in the Work.”

AIA B101-2017, § 3.6.2.1

Site Observation: Frequency

AIA B101-2017, § 3.6.2.1

- “The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.2.3.”

§ 4.2.3

- “The Architect shall provide Construction Phase Services exceeding the limits set forth below as Additional Services. When the [limit of _____ visits to the site by the Architect during _____ construction is] reached, the Architect shall notify the Owner.”



Site Observation: Frequency (cont.)

- If number of site visits is not specified in contract, it becomes Standard of Care question as to how often DP should visit site
- Contract should clearly define how DP should be compensated for site visits
- Don't send a junior employee to do site observation unless he/she is coached regarding:
 - What to look for
 - Photos to take



6

Requests for Information

What's the Problem with RFIs?

- Contractors may use them to support claims based on:
 - Changed work
 - Errors and omissions
 - Construction delay



Pointers for Dealing with RFIs

- Don't change scope of work via RFI response
- Respond according to the contract
 - Most contracts specify the time allowed
 - If response time is your “professional judgment,” act as promptly as you reasonably can
- What to do if the RFI reveals an error/omission in your drawings?

Pointers for Dealing with RFIs

- RFIs and responses - written
- Require Prime to review and approve subcontractor RFIs before DP reviews at the request of the Prime
- Provide concise, unambiguous responses that:
 - Cite the contract docs, plans & specs
 - Answer the question
- *Example claims against DPs*



7

Shop Drawing Reviews

Shop Drawing Review: Purpose

“The Architect **shall review and approve or take other appropriate action upon** the Contractor’s submittals . . .but only **for the limited purpose of** checking for **conformance with information given** and the **design concept expressed** in the Contract Documents.

Review of such submittals is **not for the purpose of** determining the accuracy and completeness of other information such as **dimensions, quantities, and installation or performance of equipment or systems**, which are the Contractor’s responsibility.

The Architect’s review **shall not constitute approval of safety precautions or construction means, methods, techniques, sequences or procedures.**” AIA B101-2017 3.6.4.2

Court Finds Engineer Not Liable for Means/Methods in Shop Drawing

(1 of 2)

- Owner's engineer **approved** contractor's shop drawing showing method of post-tensioning bridge
 - The method was later determined to be unworkable and dangerous
- Engineer's stamp stated:
 - "Review of this document is for conformance with the design concept of the project only. Contractor is responsible for confirming field dimensions, for information that pertains solely to the fabrication processes or to the techniques of construction, and for coordination of the work of all trades."



Not Liable for Means/Methods

(2 of 2)

- Court held engineer was:
 - Not contractually responsible for the contractor's means and methods
 - Not liable for errors in the shop drawings despite having approved the shop drawings

- Engineer's contract with the owner stated:
 - "Checking and/or approval of shop drawings will be general, for conformance with the design concept of the Project and compliance with the information given in the Contract Documents.
 - Approval shall not be construed as permitting any departure from contract requirements ... nor as relieving the Contractor of the responsibility for an error in details, dimensions, or otherwise that may exist."

- Court noted that the engineers shop drawing stamp matched the contract language
 - *D.C. McLain v. Arlington County (Virginia)*

Shop Drawing and Submittals: Pointers

(1 of 2)

- Comply with contractually established time-limit requirements for responding to RFIs (and don't contractually agree to unreasonably short time to respond)
 - If the time limit for reviewing a submittal must be exceeded for reasons beyond the DP's control, clearly document these reasons to the owner and contractor

- Use a standardized shop drawing stamp and transmittal form
 - The stamp should clearly state the limited purpose of the review

Shop Drawing and Submittals: Pointers

(2 of 2)

- Prior to construction, determine the Contractor's submittal requirements under its contract
- Don't review submittals for construction means, methods and procedures
- Don't include comments that could be interpreted as changing the scope of work
- If you reject a proposed substitution, clearly communicate the reason to the owner (*e.g., litigation*)

Shop Drawing Reviews: Timeliness

- **B101-2017, Section 3.6.4.1**
 - ... The Architect’s action in reviewing submittals shall be taken **in accordance with the approved submittal schedule** or, in the absence of an approved submittal schedule, **with reasonable promptness** while allowing sufficient time in the Architect’s professional judgment to permit adequate review.”

- DP should verify that the timing provided in construction contract is consistent with its obligations under its own contract. (*What can be done while exercising Standard of Care*)?

- **Risk Management Pointer:**
 - Be careful what is committed to by contract
 - Honor the contractual commitments

Avoid Design Changes via Shop Drawing Review

- Contractors complain that through rejections and comments on the shop drawings, architects change the design
 - Contractor then demands a change order from the owner, and in some cases makes a claim against the design professional for interference with its contract

- Review is to determine that the shop drawing meets the “information given” and “design concept expressed” in the contract documents



No Substitutions via Submittals

- “... the Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order or Construction Change Directive.”
 - A201-2017, § 3.4.2.

- If DP objects to a proposed substitution of a product or equipment, or a value engineering proposal, clearly explain (in writing) the basis for the rejection/objection

Substitutions Not Approved by DP

- What if owner overrides the DP opinion regarding substitution?
- AIA B101 -2017 § 3.1.4 provides:
 - “The Architect shall not be responsible for an Owner’s directive or substitution. . . made or given without the Architect’s written approval.”

8

Change Order Reviews

Analyzing Change Order Request or Claim

- Be careful about checking the box on owner generated forms showing reason for change order, such as:
 - Owner change
 - Design error
 - Contractor proposed change



Assessing Potential Responsibility for Making the Change

- Don't execute change orders stating changes were necessitated by design errors
 - Note that some owners use forms requiring this: Be careful!
 - Preserve legal determination of causation for later

- If RFIs or change order requests suggest to you that your client might later make a claim against you for costs or damages associated with design acts, errors or omissions, notify the insurance company promptly

Analyze KR's Claimed Entitlement

- DP must act with impartiality in evaluating change order requests
 - Be careful of contract language stating that DP is to serve the “owner’s best interests”
 - Delay damages due to delays by others
 - Lost efficiency due to out of sequence work
 - Cost overruns due to changes, errors, omissions, inaccurate cost estimates, contractor defaults



Reject the Work/Stop the Work

AIA B101-2017 § 3.6.2.2

- The architect has the authority to reject work that does not conform to the contract documents
- If you reject work, put into a writing a succinct technical explanation for why the work was rejected
- Do you have the contractual right to stop the work?



Responsibility to Stop the Work

- Some courts have interpreted the responsibility to stop work that is not in compliance with the contract documents as giving rise to a duty towards construction workers who were injured when proper safety procedures were not followed
- Some DPs require that their contract explicitly state that they do not have the authority to stop work
- Even if DP doesn't have authority to stop work, DP may be found liable if it observes an *imminent* danger from unsafe condition and doesn't take some action

9

Certifications

Certifications

- Avoid contract language requiring DP to sign certifications of matters for which DP doesn't have actual knowledge or that would require DP to go beyond its scope of service to acquire such knowledge
- Addressed in AIA B101-2017, §10.4 as follows:
 - “The Architect shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of this Agreement.”



Dangerous Certification

- Watch out for contracts containing language requiring DP to issue a certification stating contractor's work was completed in accordance with all plans and specifications
 - Example:
 - *“Upon completion of the construction, the DP shall certify that the work was completed in accordance with the plans, specifications and drawings.”*

- Unless DP watches every move of contractor every day, it can't know with certainty how the work was completed — and even then, it probably wouldn't be possible

Certification

- Based on “**professional opinion,**” or “**to the best of our knowledge, information and belief**”
- Don’t certify that contractor satisfied all details of the plans and specifications
- A certification concerning the contractor’s work might state:
 - “**To the best of our knowledge, information and belief,** the project was constructed in general conformance with the design concept of the contract documents.”

Conclusion: Stay Focused!



10

Questions

Disclaimer

This information is not legal advice and cannot be relied upon as such. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting contract language.

Questions?



COURSE CONTENT

J. Kent Holland, Esq.

ConstructionRisk, LLC
7726 Bridle Path Lane
McLean, VA 22102
(703) 623-1932 (cell)
kent@constructionrisk.com



INSURANCE PROGRAMS

Sandip R. Chandarana

J.D., Program Director
Professional Underwriters Agency (PUA)
2803 Butterfield Road, Suite 260
Oak Brook, IL 60523
(630) 861-2330
sandip@puainc.com

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