

# Construction Phase Design Professional Risks

J. Kent Holland, J.D.

&

Suzanne H. Harness, J.D., AIA

ConstructionRisk, LLC

1950 Old Gallows Rd., Suite 750

Tysons Corner, VA 22182

703-623-1932

# AIA Registered Course

- This course is taught by a Registered Provider with The American Institute of Architects Continuing Education Systems. Credit earned on completion of this program will be reported to CES Records for AIA members. Certificates of Completion for non-AIA members are available on request.

This program is registered with the AIA/CES for continuing professional education. As such, it does not include content that may be deemed or construed to be an approval or endorsement by the AIA of any material of construction or any method or manner of handling, using, distributing, or dealing in any material or product. Questions related to specific materials, methods, and services will be addressed at the conclusion of this presentation.

# Copyright information © 2016

- This presentation is protected by US and International copyright laws. Reproduction, distribution, display and use of the presentation for internal use of attendees is granted. Other use without written permission is prohibited.

# What are the Construction Phase Services - 1

Typical services provided by a Design Professional:

- Review shop drawing submittals
- Respond to Requests for Information (RFI)
- Observation or Inspection of contractor's work (rejecting work)
- Inspection for Payment
- Inspection for Substantial and Final Completion
- Issue various certifications such as Certificates for Payment / Substantial and Final Completion
- Authorize minor changes
- Evaluate change requests/issue change orders
- Evaluate claims / disputes
- Coordinating services of other consultants of the owner
- Scheduling
- Safety responsibilities

# Who can make a claim?

- those in privity of contract with DP
  - client/owner
  - design-builder
- third-parties that are not in privity of contract
  - construction contractors, subcontractors, suppliers
  - construction laborers, site visitors, lenders, sureties
  - building users (both now and later)

# Standard of Care

- “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.”
  - Must be expert testimony both as to the standard care and consultant failure to comply, or consultant can’t be found to have violated the professional standard of care and can’t be found negligent.
- **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.”
- Expert testimony required as evidence

# Risks of Coordinating Services of others

- Who has responsibility
  - to coordinate multiple prime contractors?
  - maintain progress schedule of prime contractors, evaluate and report progress to owner?
  - review and update schedules

# Warranty of schedule

- Who is responsible for the project schedule?
- DP that reviews and approves updated schedule is responsible to act within standard of care - e.g., detect obvious errors.



# Requests for Information (RFIs)

# Pointers for Dealing with RFIs

- Establish standard procedures for responding to RFIs;
- Create RFI log to track them by number, date received, title, response, and response date;
- Require all RFIs to be in writing;
- All responses to RFIs to be in writing;
- Only permit RFIs from the GC, and not from subs.
  - Subs must submit their own RFIs to the GC.
- Provide concise, unambiguous responses;
  - Cite the contract docs, plans & specs if answer comes from those documents.

## More RFI Pointers

- Require all RFIs to be in writing
- Only permit RFIs from the general contractor – not subs
  - Subs must submit RFIs through the prime

Be careful not to change scope of work via RFI response when change order is what is actually needed.

# Shop Drawings

# Shop Drawing Reviews

- The contractor must at all times remain solely responsible for the means, methods, procedures, materials, and equipment it chooses to perform its work.  
See AIA B101 3.6.4.1
- Consultant's review should be limited to determining that the submittal conforms generally with the project design, plans, and specifications.
- Consultant's stamp should state the limits of the review.
  - Note that the construction contract should also state the limits of the consultant's review.

## Shop Drawing Review: Purpose

AIA B101 3.6.4.1. . .”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, unless otherwise specifically stated by the Architect, **of any construction means, methods, techniques, sequences or procedures.**”

## Liability for changes impacting contractor

- Where DP responsible for reviewing and approving contractor's shop drawings, a court found it liable to the contractor for "negligent misrepresentation" when it refused to approve change orders.
- Another court found a DP may liable when it:
  - "supplies faulty information, fails to exercise reasonable care in obtaining and communicating information, and there is justifiable reliance on the information."
- And some courts have found DP liable to contractors or bidders for rejecting "or-equal" equipment or writing and enforcing disguised sole source specs.

# 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
  - 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, drawings will be general, for conformance with the design concept of the Project and compliance with 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)*
- **Risk Management Pointer:** Include good disclaimer language on the shop drawing stamp.

# Shop Drawing Reviews: Timeliness

- B101, Section 3.6.4
  - The Architect shall review the Contractor’s submittal schedule. . .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.
- **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.
- Whatever DP marks up or comments on re the shop drawings must have basis in the contract documents.
- **Risk Tip:** (1) Issue no cost/no time minor mod to the Work
  - Make sure you have the contractual right to do so; or have owner issue change order with revised time and include time and/or cost

## 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, 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:

- AIA B101 -2007 provides:

“The Architect shall not be responsible for an Owner’s directive or substitution made without the Architect’s approval.”

# Shop Drawing and Submittals - Pointers (1 of 2)

- Create standard procedures for reviewing submittals
- Create a log to track the date the submittal was received, submittal number, name of submittal, spec reference, to whom distributed, review action taken by DP, and date returned to Contractor
- Comply with time-limit requirements for responding; if the time limit for reviewing a submittal must be exceeded for reasons beyond the DP's control, clearly document these reasons
- 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)

- Require Contractor to clearly identify any substitutions or deviations in the submittal transmittal letter.  
Prior to construction, determine the Contractor's submittal requirements under its contract.
- Don't review submittals for construction means, methods and procedures - that is Kr responsibility
- Don't review submittals for temporary aspects of the work that fall within Kr means, methods and procedures.
- Do not include comments that could be interpreted as changing the scope of work

# Change Order Reviews



# Responsibility for prompt change order reviews

- contractors have successfully recovered against DP for change order reviews that were:
  - tardy
  - negligent
  - negligently misrepresented to owner or contractor

# Analyzing Change Order Request or Claim

- Analyze legal entitlement and quantum claimed by contractor
  - 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.
- Be careful about checking 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

- Do not execute change orders stating that changes were necessitated by design errors.
  - 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.

# Certifications

# Certification

## Knowledge Within Contract Scope

- Avoid contract language requiring DP to sign certifications of matters for which DP does not have actual knowledge or that would require DP to go beyond its scope of service to acquire such knowledge.
- Addressed in AIA B101-2007, §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.”

# 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.”*
- The reality is that 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

- Base 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.”

## Payment Certifications

“The Architect’s certification for payment shall constitute a representation to the Owner, **based on the Architect’s evaluation of the Work as provided in Section 6.2 and on the data comprising the Contractor’s Application for Payment,**

that, **to the best of the knowledge, information and belief,** the Work has progressed to the point indicated and that, the quality of the Work is in accordance with the Contract Documents.”

AIA B101 -2007, Sec. 3.6.3.1



# Monitoring/Observing Contractor's 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 report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work.

AIA B101-2007, §3.6.2.1

## 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, and (2) defects and deficiencies observed in the Work.”

## Site Observation (Frequency)

- AIA B101-2007, 3.6.2.1
- “The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.3.3.
- **§ 4.3.3** 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 over the duration of the Project during construction is] reached, the Architect shall notify the Owner.

## Site Observation Frequency (2)

- 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.

# Substantial Completion/Final Completion “Inspections”

AIA B101 only requires inspections for Substantial and Final Completion:

3.6.6.1 The Architect shall conduct inspections to determine the date of Substantial Completion and the date of final completion. . .issue Certificates of Substantial Completion. . .and issue a final Certificate for Payment based upon a final inspection indicating the Work complies the requirements of the Contract Documents

3.6.6.2 The Architect’s inspections shall be conducted with the Owner to check conformance of the Work with the requirements of the Contract Documents and to verify the accuracy and completeness of the list submitted by the Contractor of Work to be completed or corrected.

During construction, DP makes “observations” of work. Article 3.7.2.1.

# Reject the Work/Stop the Work

## AIA B101 3.6.2.2

- The Architect has the authority to reject Work that does not conform to the Contract Documents
- Do you have the contractual right to stop the work?
- If you reject work, put into a writing a succinct technical explanation for why the work was rejected. This also applies to rejection of equipment or material substitution requests.

# 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 DP's require that their contract explicitly state that they do not have the authority to stop work.
- Even if the DP does not have the authority to stop work, the DP may be found liable if it observes an unsafe condition and does not immediately notify the Contractor.



# Responsibility to Accept Work

- Consultants should not agree to contract language that requires them to accept the Work.
- While the Consultant can make recommendations to the Owner as to whether the Work should be accepted, only the Owner can ultimately accept the Work.

# Communicating Clearly, Promptly and to the Right People

- What did DP agree to by contract?
- Did the DP promise too much, or more than contractually required?
- Did DP do what was promised?
- Did DP advise client what client needed to know to make good decisions?
- How does DP document its communication?

# Documenting the Progress

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

# Stay Focused!



# Site 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 101-2007, § 3.6.1.2 and AIA A 201-2007, § 11.1.4), 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 Consultant tell contractor what to do?
    - did 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; and the right to stop the work.”

# Architect Liable to an Airport Maintenance Person Electrocuted While Working on an Electric Switchgear Box Without Warning Labels

- Employee of airport was electrocuted while attempting to repair an electrical transformer that lacked required wiring diagrams and warning signs.
- 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, 974 N.E. 2d 34 (Mass. 2012)*

# CM Not Responsible for Jobsite Safety

- In *Hunt Construction Group, Inc. v. Garrett* (964 N.E. 2d 222, Indiana 2012), an employee of a concrete contractor (Baker Concrete Construction, Inc.) was injured in a workplace during construction of a stadium. She 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

# CONTACT Information & DISCLAIMER

- Contact Information: **Kent Holland**

Email: [Kent@ConstructionRisk.com](mailto:Kent@ConstructionRisk.com)

WEBSITE: [www.ConstructionRisk.com](http://www.ConstructionRisk.com) - Free Risk Report

Phone: 703-623-1932

**Disclaimer:** This information is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.

# Questions?

J. Kent Holland, Esq.

**ConstructionRisk, LLC**

1950 Old Gallows Rd, Ste 750

Tysons Corner, VA 22182

703-992-9480 (o)

703-623-1932 (c)

Kent@ConstructionRisk.com

- For case notes and articles on design-build decisions and other case law, visit: [www.ConstructionRisk.com](http://www.ConstructionRisk.com). For research or for free newsletter, visit: “*ConstructionRisk.com Report*”