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Construction Observation: Important Risk Management Service

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Introduction

Construction observation is a powerful weapon for architects and engineers (A/E) in their risk management arsenal. Certain clients understand the benefits when A/E firms offer construction phase services. However, driven by slow economic conditions, many clients are asking firms to do more with less, including reducing or eliminating construction phase services. Other clients decide they will administer the construction contract themselves or decide to use a third party instead of the A/E firm. Clients have also held the A/E to a higher standard of care when providing construction observation services. How do these actions affect A/E firms? It significantly increases the A/E's risk and liability exposures.

Construction Phase Risks

Details in design documents cannot anticipate every contingency that may occur during the construction phase. If the A/E firm of record is not retained to provide clarification of the plans and specifications the risk of misinterpretation of

the contract documents increases. Bad decisions can lead to project confusion, delays, increased costs, disputes and claims between the owner and the A/E.

The exposure of the A/E is increased due to certain owners and contractors asserting that the designer has a similar responsibility of the contractor for discovering all defects on the project. Based on this distortion and unrealistic expectation of construction observation services, owners and contractors have stated the A/E should be a guarantor of the contractor's work. These expectations dramatically increase the A/E's standard of care and risks associated with construction phase services. Court decisions have ruled in Owners' favor holding that the A/E has a duty to guard the owner against all non-conforming work on the project, although much of that work was completed when the firm was not present onsite. Members of the plaintiff's bar continue efforts to hold the A/E accountable for this higher standard of care for construction phase services.

Standard of Care

The A/E's construction observation standard of care, unless increased by contractual provisions, or by conduct is identified in general terms as: "reasonable care for discovering and report-

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ing nonconforming work through observation at certain times during the construction phase, general familiarity with the work and reporting the general progress and quality of the work as completed, to the owner.” The A/E’s construction phase service standard is clearly different from the contractor’s where they are responsible for the means and methods of the construction process.

Assignment of Construction Phase Risk

All parties involved in the design and construction process share in a significant amount of risk. The most effective risk management strategy is to have the party with the responsibility of providing the service retain the responsibility for managing the associated risk. When the A/E of record is not permitted to perform construction observation services through the construction phase it loses the ability to manage that exposure while retaining a great deal of potential liability. A/Es that provide construction phase services are in a better position to protect the client’s interests, as well as mitigating their own risk. The design A/E is clearly in the best position to reduce misunderstandings of design intent thereby avoiding incorrect modifications to the design that lead to disputes and claims.

Construction Phase Risk Management Strategy

If construction observation services are not included in the A/E’s scope of services, the A/E should protect themselves against potential claims. If the client is assuming the responsibility for decisions made during the construction phase, the client or owner’s representative should also assume the risk. The party performing the observation services and administering the construction contract, should assume responsibility and risk for its actions in interpreting the documents and making decisions on the project site. The A/E should be released from any claims and be indemnified for costs or problems associated with changes made by others.

The most effective approach when offering construction phase services is with a full-time, on-site project representative. With this level of construction phase services the chances of discovering and correcting defects in construction phase work increases. Based on a survey of design professionals, approximately 20% of firms offer this level of construction phase service. If a client does not select this option, the next step is visiting the site at “appropriate intervals” during the construction process. Approximately 40% of firms offer this level of service. Another 20% offer as requested by the owner and the remaining 20% stated no construction observation services were provided. It is important to explain the trade-offs to the client in each level of service, quality and associated fees. The client’s decision regarding construction phase services needs to be documented as well as your offerings.

Consultant Providing Construction Phase Services

Contract provisions establish the ground rules and responsibilities between the parties. It is vital that clear contract provisions are developed, and agreed upon, in writing between parties prior to work commencing. The following are “sample” contract language provisions that has been used when offering construction observation services:

Construction Observation Services

The Consultant shall visit the site at intervals appropriate to the stage of Work in Construction in order to observe the progress and quality of the Work completed by the Contractor. Such visits and observation are not intended to be an exhaustive check or a detailed inspection of the Contractors work but to become generally familiar with the Work in progress and to determine, in general, if the Work is proceeding in accordance with the Contract Documents. Based on this general observation, the Architect shall keep the Owner informed regarding the progress and quality of Work and shall endeavor to guard the Client against

deficiencies in the Work. The Consultant Construction Phase Services exceeding the visits, reviews and observations indicated in this agreement shall be considered as Additional Services.

When providing any construction phase services, the contract should include express language that the contractor is solely responsible for the construction site and construction means, methods, techniques, sequences and procedures that are used to perform work as well as job site safety. The following is “sample” language addressing this topic:

Construction Phase Services

In the Consultants Construction Phase Services, it is understood that the Contractor, not the Consultant is responsible for the construction of the project, and the Consultant is not responsible for the acts or omissions of any contractor, subcontractor or material supplier; for safety precautions, programs or enforcement; or for construction means, methods, techniques, sequences and procedures employed by the Contractor.

Consultant Not Providing Construction Phase Services

Risk increases when a client does not allow the consultant to provide construction observation services. In that scenario, the client should acknowledge the responsibility that accompanies making interpretations and changes at the site. A waiver of all claims and indemnification for any cost associated with interpretations and changes made should apply. If the A/E is denied the opportunity to protect the design integrity, and the client’s interests, the contract should release the A/E from claims made by the client as well as protect the firm from any contractor or other third-party claims.

The following is a “sample” contract language (short version) for owner responsibilities and releasing the A/E from claims:

Owner’s Construction Phase Service Responsibility

Owner assumes all responsibility for interpretation of the Contract Documents and for construction observation or review and waives any claims against the Consultant that may be in any way connected thereto.

The following is an example of release and indemnification language.

Consultant Not Providing Construction Phase Services

Based on the Client’s decision the Consultant’s services shall not include Construction Phase services, the Client shall be solely responsible for interpreting the Contract Documents and observing the Work of the Contractor to discover, correct or mitigate errors, inconsistencies or omissions. If the Client authorizes deviations, recorded or unrecorded, from the documents prepared by the Consultant, the Client shall not bring any claim against the Consultant and shall indemnify and hold the Consultant harmless from and against all claims, losses, damages and expenses, including but not limited to defense costs and the time of the Consultant to the extent such claim, loss, damage or expense arises out of or results in whole, or in part from such deviations, regardless of whether or not such claim, loss, damage or expense is caused in part by a party indemnified under this provision.

Conclusion

Construction observation is a very important service assisting in mitigating project risk for owners and A/E firms. Making risk management a priority is vital to any project. However, it is especially important during a slow economy when claims and litigation are on the rise. Construction observation will also be an important service when abandoned and suspended projects restart which carry their own unique risk characteristics and mitigating strategies. Some clients understand the benefits of construction phase services while others feel it may be redundant or an unneces-

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sary service. In all cases, A/E firms should have an established strategy that is applied firm wide for addressing construction phase services.

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This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.

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