

Viewpoint: So Who Is the Designer In Construction Projects, Anyway?

The changing map of construction risk

By Ken Rubinstein and Michael Balmer

There are many advantages to using collaborative delivery, building information modeling and prefabrication. By bringing contractors on board earlier in the project, owners are able to compress the schedule, avoid overlap and take advantage of each project member's strengths. As contractors take on a greater role in a project's development, many are also accepting an unanticipated design and professional responsibility.

That could invite trouble. Contractors who fail to understand the implications of these blurred responsibilities expose themselves to unintended and potentially significant liabilities.

Historically, most contractors have carried standard general liability insurance to protect them from liability for losses caused by ordinary "construction means and methods." Such policies cover claims over bodily injury and/or property damage arising from an occurrence. However, such policies inevitably contain exclusions for professional services such as design.

Professional liability policies cover damages that arise from the rendering or failure to render professional services. Coverage also extends to economic damages, such as the financial consequences of a delay, and can be extended to include coverage for "rectification," (mitigation costs following discovery of a design error – i.e. before the issues has developed into a claim). The extensions may also include contingent professional liability coverage (also known as

"protective" coverage) for the contractor or construction manager should the professional liability policies of design or specialty subs prove to be inadequate.

While design responsibility was once thought to be the sole province of the architect or engineer, contractors are assuming the responsibilities with increasing frequency.

Collaborative delivery methods such as design-build necessarily require contractors to assume design responsibilities as part of their contract by definition. Similarly, as the construction manager at-risk model is becoming increasingly common, contractors are assuming new roles such as design-assist, in which they can easily stray into a design responsibility when giving specific advice regarding design elements. Similarly, contractors that provide project scheduling and cost estimating services may also be seen to be providing "professional services," and therefore may not be adequately covered under their standard general liability insurance.

Design liability is even present for contractors using the standard design-bid-build method, as many modern contracts include pockets of design delegation within the specification. Electrical, curtain wall and mechanical subcontracts are increasingly let on the basis of "performance specifications," leaving the subcontractor to finalize the fine design detail and the general contractor contractually responsible for the outcome.

Collaborative approaches can streamline the construction process by avoiding duplication, but in these instances, the contractor frequently assumes design responsibility—regardless of the fact that they won't be asked to stamp any plans or drawings. Similarly, where architects specify prefabricated systems, contractors can, in some circumstances, be responsible for the design going into the systems (whether the system is their own design or their subcontractor's).

Courts have been slow to keep up with these changing norms. In Massachusetts, for example, a court held that a construction manager that had provided design assist services was responsible for errors in the architect's plans and specifications. That decision was later overturned, but the initial ruling reflects the broader confusion in an industry that has traditionally been slow to embrace change.

Ten years ago, few contractors carried professional liability insurance as part of their standard insurance program, other than those who regularly taking part in engineer-procure-construct projects. For most contractors today, however, such insurance has become a necessity and coverage should be carefully crafted to address the nature of their operations. The good news is that there are insurance products that are specifically designed to address the professional or design liabilities increasingly assumed by contractors and construction managers.

As long as companies stay aware of the issues, the risks won't go away but they can be effectively managed and mitigated.

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