



A&E briefings

Structuring risk management solutions

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What do owners want? (Part 4 of 4)

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We conclude our four-part discussion of Owner issues during design and construction contract negotiations by focusing on Contractor responsibilities, because they often affect the work of design professionals.

Again, members of the American Bar Association (ABA) Forum on the Construction Industry who typically represent Owners and Lenders were surveyed. The comments are referenced to The American Institute of Architects (AIA) document "A201-1997, General Condition of the Contract for Construction." The paragraphs shown in italics are a discussion of the issues identified in the survey conducted by the ABA Forum.

Review of Contract Documents by Contractor: Paragraph 2.2.1

A Contractor's standard of care in the review of Contract Documents is established in this paragraph: for facilitating construction, not for the purpose of discovering errors, omissions or inconsistencies.

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What do owners want? (continued)

Owners and Lenders perceive this standard has been unacceptably lowered from the 1987 edition of A201. Owners want to rely on the Contractor as the expert for adequacy and coordination. Owners want a “prudent Contractor” standard that promotes early identification and mitigation of plan deficiencies: a Contractor’s review is to discover deficiencies a prudent Contractor should have identified. Owners usually want to negotiate this allocation of responsibilities.

Responsibility for Means and Methods: Paragraph 3.3.1

The Contractor is solely responsible for means and methods of the Work unless the Contract Documents give other specific instructions. If the Contractor determines that such instructions “may not be safe,” written notice to the Owner and Architect is required and the Contractor shall not proceed with that portion of the Work. If instructed to proceed, the Contractor is exonerated from liability.

Owners want to allocate appropriate responsibility so that the Contractor is not relieved from damages caused by its own negligence in following the Owner’s instructions.

Architect as Interpreter: Paragraph 4.2.11

This paragraph states: “The Architect will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor.”

Owners and Lenders do not consider Architects as appropriate judges of contract performance. They want Architects to be limited to matters of professional specialization such as comparing the construction to determine conformity with the plans, responding to technical requests for information and drafting modifications to the plans. Owners think that questions of whether the contract has been performed or breached should be determined by arbitrators or others qualified by training and experience to exercise judicial or quasi-judicial functions. Architects should be concerned with the scope and responsibility of “Administration of the Contract” so as not to be cut out of the loop as to activities and changes during construction.

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These comments do not reflect an official position of the ABA, the Forum on the Construction Industry or any of its Divisions.

Hazardous Materials: Paragraph 10.3.3 and 10.4

The AIA documents usually apply comparative indemnity, which is the proportionate sharing of responsibility for actions and damages. These paragraphs break with that concept and result in a special indemnity. In regard to release of hazardous materials, the Owner is required to indemnify the Contractor, Subcontractors, Architect and Architect’s consultants, unless any of these parties was solely responsible. (If the Contractor is 99% responsible and the Owner is 1% responsible, the Owner must indemnify the Contractor.)

Owner and Lender concerns include providing indemnity for negligence. If the Contractor brought substances to the site, or if the Contractor’s negligence causes a release of hazardous material, the Contractor should be liable. Owners seek a better allocation of responsibility.

Statute of Limitations: Paragraph 13.7

The provisions of this paragraph may shorten the time to pursue claims as provided by individual state statutes and precedent. In states where the discovery rule applies, under the AIA clause the right to pursue claims can expire by the time the problem is discovered.

Owners usually prefer to delete this clause and leave the statute of limitations to existing law in each jurisdiction.

Existing risks

Much of the management information for architects, engineers and other design professionals focuses on the risks associated with new construction. But a good percentage of work in the construction industry involves existing structures, whether it is the rebuilding of a concrete bridge deck, facilities maintenance for a manufacturing plant, the preservation and adaptive reuse of an historic public building, retail tenant work in an airport, seismic upgrade of a school or a remodeling and addition to a single family house. Providing design services for an existing structure presents some unique risks.

The work

The first decision point that a design professional and the owner of an existing structure need to address is the extent of the work. This decision will affect every other issue associated with the project. Extent of the work should not be confused with the scope of your services. The extent of the work is the degree to which an existing structure will be modified or expanded.

The greater the modifications, the more likely that extensive updating will be needed to the physical structure, life safety and mechanical/electrical systems to meet current codes and accessibility requirements. Changes in occupancy and major additions will probably trigger zoning reviews. These issues are compounded if the structure is deemed historic.

Another consideration is the age and fragility of the existing structure. The inherent physical integrity of a structure may be affected by work within or adjacent to it. A good risk management practice is to document the baseline condition of an existing structure with photographs or video before any demolition or construction occurs.



Very often, updated code compliance is based on the percentage of change made to a structure, whether by square footage or monetary value, usually subject to a government official's interpretation. Owners hate surprises. To avoid having final construction documents rejected for a building permit or the structure itself denied a certificate of occupancy, work with the appropriate government officials to anticipate their requirements and be prudent in regard to current code compliance.

Site safety

Optimally, an existing structure for which you are providing design services is vacant or closed to traffic. Maintaining occupancy or traffic flow during construction presents risks that are usually the responsibility of the contractor. But some of this responsibility may shift to the design professional depending on the degree to which the construction documents specify sequencing of the project or other means and methods of the work. You can manage your risk by including wording in both the Owner-Design Professional agreement and the Owner-Contractor agreement that the contractor is solely responsible for site safety.

Information

As-builts. Record drawings. Measured drawings. These are the sources of information that design professionals rely on when developing plans for existing structures. While sometimes these three terms are used interchangeably, each is different and carries its own inherent risks for the design professional.

Existing risks (continued)

As-builts are the drawings produced by general contractors, with input from subcontractors, during the course of construction to show how the project was actually constructed or previously remodeled. As-builts may or may not incorporate information from change orders and requests for information. These supplemental documents may be delivered separately, or may just be stapled to a set of as-builts. Too often, as-builts are incomplete and inaccurate because contractors wait until the end of the project to record changes as part of the overall close-out process, rather than incorporating information as it happens during the course of construction.

Design professionals produce record drawings based on information gathered from the general contractor to show how the project was constructed or remodeled. The accuracy of record drawings depends on the diligence of the design professional's site visits and the working relationship between the design professional and the contractor. Similar to the issues with as-builts, record drawings may not be completely accurate.

Measured drawings for an existing structure are produced from scratch based on on-site surveys. Depending on the age of the structure, you may not know exactly what you are measuring. Construction standards and materials change over time. Having historical reference materials is crucial. Many architects are notorious bibliophiles. If your practice involves work on older structures, be a bibliophile with a purpose. Look for older editions of construction reference books such as Architectural Graphic Standards or the Steel Construction Manual in used book stores or the personal libraries of retiring design professionals who are usually very willing to pass them on to a younger generation.

With any "legacy" drawings, trust but verify. Compare the drawings to actual field conditions. Also, compare disciplines within drawings to verify that changes made on the architectural drawings were carried through to structural, mechanical and electrical drawings as appropriate.

In addition to these documents, the more tenured facilities and maintenance employees (a.k.a. as the veterans or the old-timers) at an existing structure may be your best sources of information. Don't be shy about talking to them.





Changes

When the term “differing site conditions” is used, most people imagine digging up something really unexpected or hazardous in the ground. But unexpected and hazardous surprises lurk in ceilings and walls and floors of existing structures. Like predicting the weather, predicting changes in alteration work is an inexact science. Design professionals usually take on an increased role with changed conditions and face increased risks as a result of the process, especially in the areas of cost and time.

Did we mention that owners hate surprises? One method of minimizing these surprises is for owners to spend some money up front for selective demolition and investigation of existing conditions. This practice certainly increases the upfront costs and time required to produce contract documents, but it results in savings for changes on the back end. Proactive planning and management for changes leads to better decisions regarding costs and schedules, rather than reactive responses to unexpected surprises.

Cost

With so many unknowns, estimating costs for design and construction work on existing structures can be risky. Design professionals may face negligence or professional liability claims in the cost estimating and budgeting processes. Designers may find themselves liable for the difference between the estimated cost and the actual cost of construction. They may also be liable for damages resulting from any contractual promise to design to meet a budget. Because

professional liability policies often exclude cost estimates from coverage, owners should be educated about the special challenges of renovation and remodeling work and the need for contingencies.

Contingencies are not inherently bad. Contingencies get a bad rap when they are misused. The American Association of Cost Engineers defines contingency as “a specific provision for unforeseeable elements of cost within a defined project scope.” Too often contingency money gets muddled between changes made to the project scope by the owner and unanticipated or unavoidable conditions encountered during construction.

Time

The same risks associated with estimating costs exist with estimating the time needed for work on existing structures. Again, this is true for the design phase as well as the construction phase: more time for the design professional to develop the construction documents and process change orders, and more time for the contractor to perform the construction work.

The design professional could potentially be held negligent for failing to deliver design drawings and process change orders in a timely manner and be held liable for delay damages. Protect yourself contractually with wording that provides for equitable adjustments for cost and schedule for your design services. For example, the R.S. Means Construction Cost Data reference books suggest that architectural fees for alteration work require an additional twenty-five to fifty percent over fees for new construction. A proportionate amount of time is needed as well.

Manage your risk

So many factors create a great deal of uncertainty in projects involving existing structures: hazardous materials, undocumented changes over the life of the structure, enhanced code scrutiny.

The best risk management practice when working with existing structures is to be as realistic and conservative as possible regarding costs, time and changes. In this case, conservative means to over-estimate. You don't have to be doom and gloom worst-case scenario, but communicate effectively with the owner from the very start about the realities of project estimates and how radically they can change.

Risk tip: I know it's here somewhere

We've all worked with people who have a two-foot high pile of paper on their desks. Some of them, somehow, can reach into the quagmire and pull out just the one document they're looking for. Most people, however, waste time looking for that important invoice, drawing, contract or letter.

What does being disorganized have to do with risk management? Plenty. Proving or disproving a professional liability claim requires paperwork. The party with the best documentation often wins. But what's the point of having the pertinent documentation if you can't find it?

The Association of Records Managers and Administrators (ARMA) says: "Information is one of the most vital, strategic assets any organization possesses. Properly organizing and maintaining records and information – in paper and electronic formats – is key to enterprises of all sizes and types. The ability to identify, organize, maintain and access needed information and properly dispose of the rest pays off in cost savings, efficiency, regulatory compliance and reduced litigation risk."

Design professionals need to make a value judgment about two types of information: business papers and project papers. Do I keep it or throw it away? This raises the question of whether the piece of paper is a document (short-term information) or a record (long-term information). If it is a record and I keep it, where do I put it? This raises the question of whether the piece of paper will need to be easily or frequently retrieved, or can be put into storage. If I put the piece of paper into storage, how long should I keep it? The answer can depend on your individual state statutes of limitations and repose.

One important point to remember. More than one person should be able to find any piece of paper required at any given moment. Redundancy is key. If something happens to you, or to the assistant who does all the filing, could someone else find a needed piece of paper within a reasonable time frame?

If you're not organized, or not as organized as you want to be, here are a few general tips:

- First, think vertically, not horizontally. Disorganization usually starts on horizontal surfaces: the desk, the chair, the floor. Make an effort to get rid of the piles. As organization coach Carol Halsey advises: "Turn those piles into files..."

- Second, a little bit goes a long way. Spending the last ten minutes of your day organizing your desk has two benefits: the piles won't keep growing and psychologically, it is more pleasant to walk into a clean office the following morning. If your space is organized, your thoughts are organized too.

Managing the paperwork that accumulates in a busy design professional's office takes time and persistence, but it is an important risk management tool. Disorganization increases the risk that important information will be "lost," deadlines will be missed, and claims or disputes won't be resolved quickly.



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