



Legal Counsel for the Design Professional *Spring 2023*

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The Architect's Decision to Perform Construction Administration Services and How to Manage the Risk

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Understanding Contractual Insurance Requirements

Insurance is critical to the construction industry. Commonly misunderstood insurance requirements can lead to coverage issues for design professionals and contractors.

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The Architect's Decision to Perform Construction Administration Services and How to Manage the Risk

04.11.23 | BY DOUGLAS R. HALSTROM

When it comes to risk management, the architect's construction administration responsibilities invariably become a focus because this scope of work can potentially expose the architect to unwarranted liability. This article sets forth the reasons why architects should be willing to take on construction administration services and how best to perform these services to limit exposure to additional liability.

Staying involved with the project after the completion of the design phase places the architect in the best position to address issues that arise during construction and resolve them before they turn into litigation. Take for example, change orders. Performing construction administration services provides the architect with the immediate opportunity to respond to situations giving rise to disputes involving change orders. Change orders can be the result of field conditions, design omissions, design errors, construction errors, owner-directed scope changes, or other matters. Permitting the contractor and owner to categorize change orders as design errors or omissions without the architect's input and direction opens the door to these parties to build a case against the architect while allowing the contractor and others to proceed unscathed, depending on the situation. Conversely, if the project architect remains involved during the construction phase of the project, the architect is uniquely qualified to determine whether the proposed change order is a true change from the original design, or whether the work identified as a change by the contractor is covered within the scope of its existing contract for the project, or the result of a field condition (or something else). In this scenario, the project architect is able to communicate the necessary assessment to the owner and contractor to achieve resolution of most, if not all, potential issues surrounding change orders, and thereby lessen the potential for litigation down the road.

Additionally, the contractor may identify aspects of the construction documents which omit necessary information, or the project drawings and specifications may be inconsistent with certain details. Addressing situations like these immediately, ensures they are handled seamlessly and quickly when the architect is involved with construction administration, and, most importantly, helps to avoid claims of defective design and construction and delays aimed at all parties, which invariably invites finger-pointing among the members of the project team.

Hidden or unknown site conditions, particularly in projects involving existing structures, present another situation demonstrating the importance of agreeing to

perform construction administration services. The depth of adjacent foundations, or how the existing walls are waterproofed, may only come to be known during the construction phase. The architect, by staying involved, becomes part of the team assessing how to proceed, helping to avoid negative dialogue aimed at blaming the architect for not knowing these details. The team's efforts are then more likely to be focused on solutions, which helps to keep the project moving forward so delays can be minimized.

Once the architect is retained to perform construction administration functions, the architect needs to be mindful of the contract language. The AIA contract provisions pertaining to construction administration services include language like "periodic site visits at intervals appropriate to the stage of construction" so the architect can determine and confirm "that the contractor is performing in general compliance with the plans and specifications". What is meant by "periodic", and how often do you need to visit the site? Also, is it possible to know whether the contractor is in "general compliance" with the contract for construction if the architect is not present on a daily basis?

When issues like these are litigated in court, and a jury of your peers must answer these questions, the judge will likely instruct them on a reasonable person standard with little explanation as to what that means. Essentially, the standard of care is: "the Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances". The architect's construction administration responsibilities in making periodic site visits and determining whether the contractor is performing in general compliance with the contract documents will almost invariably become a focus, because it is this scope of work that can potentially expose the architect to unwarranted liability.

If the architect's contract dictates the number of site visits per week, then this removes some uncertainty as to what is expected of the architect concerning when to make the visits. Contrarily, owners may use vague wording regarding this detail, leaving it up to the architect to determine the frequency of site visits, which opens the door to questions like, "How did you know when to go the site?", or "What made you go on July 10th, but not go again until August 15th?". Clearly, knowing the progress of construction activity is critical to knowing when to make your visits, particularly if certain aspects of the work will no longer be visible after a certain date (e.g., foundation). Keeping up to date with the owner as to construction progress is, therefore, critical.

Finally, and perhaps most importantly, the architect should document their efforts with some specificity as to when they were at the site, nature of activities observed, weather conditions, a list of workers, and how the project was proceeding. Assuming the architect is being kept apprised of the progress of construction, discussed above, then the architect should indicate what they were told about construction progress,

and whether their observations are consistent with that information. Similarly, the architect should document conversations they had with people on site to give additional flavor and meaning to their observations. These are important details because the architect, in the event of a lawsuit, is likely to be questioned on their reported observations, so the notes should tell a story that fits with other project information such as budgets and schedules.

Taking care to document these events in real time will effectively prepare the architect for any potential future deposition questions. Without documentation of the architect's observations in this manner, mounting a defense to claims involving the architect's construction administration activities is difficult, as memories invariably fade quickly over time.

This article offers but a brief overview of how an architect can properly perform construction administration responsibilities, and several reasons why taking on this added service is vitally important. Should you wish to further discuss this topic, or to learn more about our firm's expertise regarding the defense of design professionals, please do not hesitate to contact our office.

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Understanding Contractual Insurance Requirements

04.11.23 | BY LEE J. SACKET

Virtually every construction contract includes a section or clause requiring the design professional, or contractor, to procure certain insurance before proceeding with the contracted for services. While not all insurance requirements are the same, the contracting party typically is obligated to procure certain insurance policies covering a variety of risks, including but not limited to, general liability insurance, professional liability insurance, and workers' compensation insurance. The primary intention is that these policies will protect the owner, while also protecting the design professional and/or contractor for any damages resulting from the design professional's and/or contractor's services, which of course also has the dual effect of protecting the owner. To this end, the design professional and contractor are typically required to name certain entities (i.e., the ownership entities) as an additional insured(s) to the insurance policies. While that requirement is relatively self-explanatory, other important insurance requirements are often overlooked and/or misunderstood by the contracting party. Utilizing an insurance broker to comply with an insurance requirement is good practice. However, should the required insurance and/or form of insurance not be procured and maintained, the owner will look to the design professional and contractor for recovery through a breach of contract claim. Thus, at a minimum, the design professional and contractor should have a basic understanding of what they are agreeing to provide. This article focuses on a commonly misunderstood insurance requirement.

Generally, a design professional's and/or contractor's insurance is required to be "primary and noncontributory" pursuant to the controlling contract. These are two separate but related requirements which, if not understood, could create exposure even when the contractually required insurance policies are procured. The term "primary and noncontributory" addresses the priority of insurance coverage. It decides which policy will respond as primary insurance, and which policy will respond as excess insurance. For example, an injured individual brings a personal injury lawsuit against an owner and design professional. The owner and design professional each have a general liability insurance policy which will cover this claim. However, the contract between the owner and design professional required that the owner be a named additional insured on the design professional's general liability policy, and that the policy be primary and noncontributory.

In this situation, the owner theoretically has two general liability policies providing coverage for this claim, i.e., the owner's general liability policy and the design

professional's general liability policy as an additional insured. The "primary" requirement dictates that the design professional's general liability policy is the primary insurance, rendering the owner's general liability insurance as excess. Compliance with this insurance requirement is often impacted through an "other insurance" clause in the insurance policy. For example, an "other insurance" provision could state that any coverage provided to an additional insured under the policy is excess unless the underlying contract that required additional insured coverage also required the additional insured coverage to be primary and noncontributory. Alternatively, the "other insurance" clause could dictate the opposite.

"Noncontributory" has nothing to do with allocation of fault among insureds but is concerned only with preventing an insurer from seeking its equitable or contractual independent right of recovery from other insurers. Using our above example, the "noncontributory" requirement means that the design professional's general liability insurer cannot seek recovery, or contribution, from the owner's general liability insurer for the claim.

Significantly, while it is not always clear in construction contracts, a primary and noncontributory contract requirement does not apply to a professional liability insurance policy. To this end, a professional liability insurance policy provides coverage for the professional only. Since the policy is not providing coverage to the owner, there is no issue of priority of insurance coverage. Along the same lines, a contract should not have an additional insured requirement for a professional liability insurance policy since a non-professional (i.e., the owner) will not be covered by such a policy.

Insurance is critical to the construction industry. It provides the necessary protection for your business and to satisfy certain conditions to provide services on a project. At a minimum, it is good practice to understand what you agreed to provide, which will allow you to determine if you are in compliance with your contract while simultaneously protecting your business.

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