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### Using Betterment as an Effective Defense for the Design Professional

Douglas R. Halstrom, Partner in the Design Professionals Group, discusses how design professionals can face claims that far exceed the reasonable cost to remedy when disputes arise concerning claimed damages for defective design, construction work, or materials.



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### What a Mess! Best Practices for A/E Firms to Address the Explosion of Project Data

Lee J. Sackett, Partner in the Design Professionals Group, writes about how proactively implementing data handling technology and policies on managing information can save A/E firms time and expense in the long run when dealing with potential claims and/or lawsuits.



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### Embracing Change While Mitigating Risk to Overcome the Skilled Labor Shortage in the Construction Industry

Daniel A. McFaul, Partner in the Design Professionals Group, writes about the growth of the construction industry and how it has led to a skilled labor shortage which may increase the risk of claims to all parties involved in construction projects.



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## Using Betterment as an Effective Defense for the Design Professional

BY DOUGLAS R. HALSTROM

The resolution of Architect and Engineer disputes with owners routinely involves the issue of betterment as it relates to the calculation of recoverable damages. When an owner is faced with a situation involving repairs or remediation to be performed in order to resolve a design or construction error, the owner sometimes chooses to upgrade materials for the repair relative to what was originally designed/specified and built. Common issues in this regard could be implementation of a slate roof in the repair when asphalt shingles were originally specified, or the use of high end marble tile when a less expensive standard tile was originally specified. As the dispute advances, the owner commonly seeks recovery of the cost of the more expensive items as its measure of recoverable damages. However, this "betterment" is not the appropriate measure of damages to which the owner is entitled.

If you, the design professional, become involved in this type of situation prior to the institution of litigation, it is best to remain part of the remediation process, to the extent possible. If the owner has not terminated your services, then it is best to make recommendations on all aspects of the repair or remediation process, including the selection of appropriate materials. In this process, you may find that the cost of materials originally specified has increased from the time of the design phase of the project, but despite the fact that the cost has increased, this new cost for the same product is likely a recoverable damage in these disputes. The key aspect is the nature of the material chosen, not just the cost of the material chosen for the repair. Staying involved as much as possible with the owner or the owner's representative throughout this process will help to minimize the owner's tendency to upgrade materials or expand scope with the expectation that the design professional is going to pay the bill at the end of the process.

If the owner or its representative resists your recommendations concerning selection of materials or definition of repair scope, then you should document your efforts in this regard by illustrating the inappropriate nature of the owner's decisions. While it is best to stay non-confrontational in these efforts, it is important to demonstrate, during the project, the details of the owner's selections versus the appropriate "in kind" materials and/or scope relative to the original contract documents so that the issue of betterment is specifically defined. This exchange should make specific reference to the original contract documents and, if appropriate, submittals and/or cut sheets, with a discussion of how the repair is an upgrade relative to what was originally designed. This will carry greater weight than a lawyer's letter down the road should the matter proceed into litigation, particularly in situations where your recommendations are made prior to the owner's implementation of the repair.

## What a Mess! Best Practices for A/E Firms to Address the Explosion of Project Data

BY LEE J. SACKET

Over the last several years, business risks have grown significantly, driven by the rapid expansion of technology. A/E firms are not exempt and in fact, based on the logistics and complexities of today's construction projects, arguably face greater risk than other professionals. Information is no longer confined to desktop computers, but is widely disbursed amongst numerous people, between different companies, using multiple devices and through various formats. Frankly, the overwhelming majority of project files are a mess. They are more voluminous than necessary and typically disorganized. The proliferation of widely-disbursed data makes it difficult to respond to potential issues or claims in a timely and informative manner, which can lead to protracted and costly litigation.

While there is no stopping the explosion of data, there are proactive measures that when implemented, can mitigate risk.

### **1. Establish clear and comprehensive policies on managing information.**

A/E firms should establish comprehensive, documented project information policies and procedures. Clear guidelines should specify how information is to be managed and for how long. Considerations for the policy should also include:

- An established e-mail sending and retention policy;
- Identification of other electronic information and data to be maintained (*i.e.*, drawings, schedules, RFIs, etc.) and length of retention;
- Location of data, including segregating data by project;
- Identification of personnel that have access to data; and,
- Frequency of backing up data.

E-mail typically composes the greatest percentage of the project file and its misuse, on varying levels, cannot be overstated. For example, as part of an e-mail policy, the practice of including unnecessary recipients on an e-mail, or over utilizing "reply all", should be discouraged. Project files are replete with copies of the same e-mail, from different user accounts, many of which have no reason to have been on the e-mail in the first place. Including a recipient on an e-mail suggests that the recipient had some involvement with that issue, which may falsely implicate a person or firm. E-mails should be limited to any necessary recipients and if your firm is on the receiving end of these types of e-mails, you should notify the sender to discontinue that practice as to your firm.

Please keep in mind that there may be certain document retention policies established by law and/or contract, depending on jurisdiction and the project. Those specific required retention policies must be incorporated into the firm's policy.

### **2. Educate staff on these policies and monitor to ensure compliance.**

Once a policy is established and the staff is educated as to the policy, the firm should conduct regular audits to ensure an understanding of the policy and compliance with the policy. There is no value in having a policy that your staff does not understand and/or follow.

### **3. Implement appropriate technology to handle and efficiently work through high volumes of information.**

While technology comes at a price, the marketplace has options which fit A/E firms of varying sizes and disciplines. The investment into data handling technology can save an A/E firm time and expense in the long run. The inability to produce information or documents to support the firm's position and/or respond to a request, can lead to increased risk of litigation and/or the inability to efficiently remove the firm from a litigation. This is a troubling trend for A/E firms that have a defense to a claim, but simply cannot provide the document or information to support that defense.

Proactively implementing policies for the management of data and documents can mitigate a firm's risk for potential claims and/or lawsuit and also conserve overhead costs through eliminating the maintenance of unnecessary and/or duplicative project documents.

# Embracing Change While Mitigating Risk to Overcome the Skilled Labor Shortage in the Construction Industry

BY DANIEL A. MCFAUL, JR.

The continuing growth of the construction industry is fueled by many factors including increased demand, population growth, global urbanization trends and the resurrection of suburban centers constructed near rail lines. As the industry continues to boom, owners, design professionals and contractors face new challenges on projects that did not exist prior to the economic downturn ten years ago. One such challenge is overcoming the skilled labor shortage which, if not addressed, may increase the risk of claims to all parties involved in construction projects.

The origin of the skilled labor shortage has its roots in the economic downturn in 2007/2008 when many contractors were forced to downsize. Unfortunately, once things turned around, not everyone returned. Some switched careers while others, including many baby boomers, retired.

Since that time, the industry has struggled to attract new talent. Millennials have shifted away from blue collar jobs and, instead, are attending college in record numbers. As a result, less are participating in vocational, apprenticeship and educational training programs which once were the norm for prior generations. Still others have been reluctant to join the construction industry because of certain perceptions, including difficult working conditions, instability and potential for injury.

While the skilled labor shortage has impacted the construction industry in many ways, perhaps most significantly, it has increased the potential for risks and claims faced by all associated with construction projects, including owners, design professionals and contractors. Given the lack of vocational training that was once a prerequisite for hiring, projects face the potential for an increased risk of injury to people and property as contractors struggle to find workers with the appropriate skill set.

In addition to safety concerns, projects face the potential for cost overruns due to delays, which often result from an inability to appropriately staff a project with workers competent to carry out the work. These delays can increase the overall cost of the project and potentially expose contractors to claims for consequential damages and liquidated damages, as well as increased labor costs due to overtime paid to workers in an effort to keep projects on schedule.

While the risks associated with the labor shortage, discussed above, seemingly affect contractors only, all parties involved in a project face the specter of being subjected to claims and lawsuits. Owners should protect themselves by performing due diligence on potential contractors and utilizing measures to avoid and mitigate the risks faced. Such measures should include checking references, performing contractor candidate interviews and even researching claim history.

Failure to do so may result in costly litigation wherein aggrieved parties (whether they be the owner, contractor, design professional or construction worker) will turn to the courts to make determinations regarding construction and design defects, delays, property damage or personal injuries.

Contractors that submit bids must be properly vetted to ensure timely project delivery within the agreed upon budget which should also minimize the potential for injury, damage and increased costs. If a contractor has a history of being unable to deliver quality, on time and within budget projects, owners (and design professionals retained to assist owners in the bid process) should proceed with caution or look elsewhere provided they are not statutorily bound to accept the lowest responsible and qualified bidder.

To address the skilled labor shortage and keep pace with the growing construction industry, contractors are embracing different avenues in order to mitigate risk. One such measure is embracing the use of technology on construction sites. Incorporating technologically based equipment, tools and programs into projects has helped attract millennials who have both an interest in technology and the requisite skill set to utilize project related technological advances. Examples include autonomous vehicles, robotics, virtual reality, business information modeling (BIM) and project management software to track project scheduling and work progress. For example, using automated machine guidance technology with a grading machine can help to grade a site faster, with more accuracy and with fewer personnel needed than is necessary for traditional site grading. Contractors have also turned to using pre-fabricated and modular products that are constructed in a warehouse or factory and then transported to a site. Using these methods has aided in providing uniformity and quality control at a decreased cost.

In order to keep pace with the growth of construction, contractors must embrace these changes. If they do so, they can remain competitive in a flourishing industry while mitigating the risks created by the skilled labor shortage.