

All contractors face professional liability exposure due to the services they provide. For some, professional services may include actual engineering, inherent construction management or field modifications to plans and specifications. For others, it is simply inherent or actual construction management or field modifications. What determines the extent of exposure is the type of contract and project delivery method under which the contractor is engaged and the services they are contracted to perform. This professional liability risk profile describes the Design-Bid-Build project delivery method and presents potential professional risk associated with this delivery method.

## CHARACTERISTICS

In Design / Bid / Build, the Owner of a project first contracts with a Design Professional (DP) or DP Team. The DP performs and completes the design plans and specifications. The 100% completed plans and specifications are then advertised by the Owner for bid. General Contractors (GC) compete for the construction contract and once awarded, the GC will construct the project according to the 100% completed plans and specifications.

The Owner has separate and distinct contracts with the DP and the GC. Importantly, there is no contractual relationship between the DP and the GC. The GC is “protected” from design liability and any errors in design plans and specifications under the Spearin Doctrine. Provided the GC follows the plans and specifications and does not alter, change or modify in any way, generally speaking, Spearin “shifts” the design liability back to the owner and / or DP.

## EXPOSURES

### SPECIFICATIONS

Performance based specifications focus on outcomes or results rather than the construction process. When performance based specifications are utilized, many times it is up to the contractor to determine the product, material, equipment, and process to perform in a specific component of the structure. Conversely, design or prescriptive specifications detail and outline exactly how the GC (or



specialty subcontractors) must construct a project. The GC can draw from past performance specifications experience and past prescriptive performance to aggressively build projects. However, the GC also oversees all project work and must ensure that agreed upon performance and construction specifications are followed and projects are completed / delivered within budget and schedule. Projects delivered to owners over budget or beyond scheduled delivery date can result in economic damages against the GC by the owner.

### FIELD MODIFICATIONS

Changes to the plans, design or construction specifications during construction (i.e., field modifications) must be approved by the CMAR. Approval of field changes are professional decisions (or can require the use of subcontracted design consultants) and can result in errors or construction failures, exposing the CMAR to a professional risk. Field modifications are a significant professional liability exposure for a CMAR

### CONSTRUCTION MEANS AND METHODS

Construction means and methods are procedures and techniques employed by contractors to assist in the construction of the permanent project or structure. They can be considered anything NOT remaining permanently with the final structure or project. Examples may include: construction cranes or tower cranes,

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## EXPOSURES (CONT'D)

temporary construction elevators, forms systems, scaffolding, safety rails and netting, temporary footings or supports, etc. Engineers (on staff or subcontracted) many times are contracted to perform services within the realm of construction means and methods. In addition, there typically is some latitude in design and product / method substitution.

Examples are:

- Construction cranes or tower cranes
- Temporary construction elevators
- Forms systems
- Scaffolding
- Safety rails and netting
- Temporary footings or supports, etc.
- Trenching or shoring systems
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There typically is some latitude in design and field substitution and if there is a failure, then the GC is exposed to a claim.

### BUILDING INFORMATION MODELING

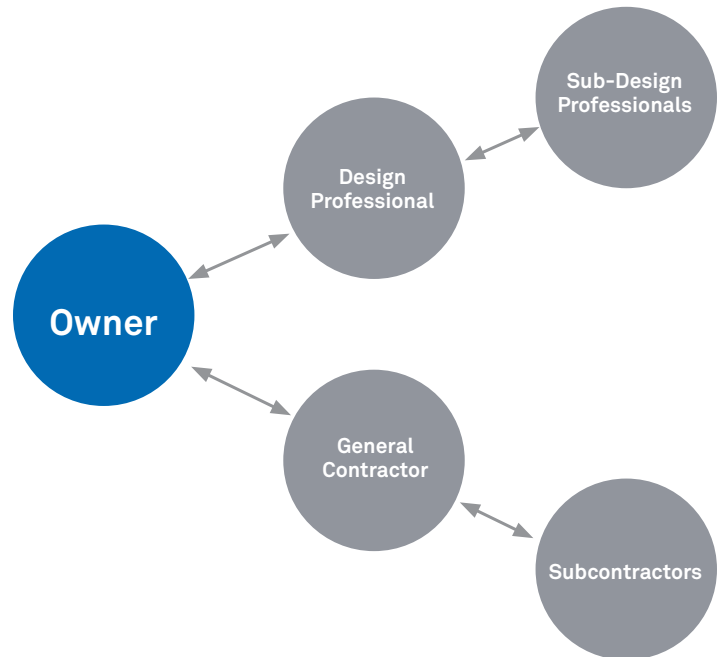
The automated use of Building Information Modeling (BIM) came about in the late 1980s. Although not as impactful on the GC for a Design / Bid / Build project, it can still be used by the GC to assess the phasing and sequencing of construction. Any "professional" input provided by the GC that results in damages to an Owner can expose the GC to professional liability. In addition, erroneous application of BIM to manage construction could result in professional liability.

### CONSTRUCTION MANAGEMENT

Every GC in the field is "inherently" performing construction management (CM), even if not under specific contract to do so. For example, field CM activities can include:

- Managing subcontractors
- Inspecting for faulty work (e.g., oversight of concrete work, including reinforcing steel spacing, form spacing, etc)
- Providing proper direction to subcontractors
- Establishing and maintaining the scheduling / sequencing of construction
- Managing project budgets
- Managing shop drawing for field modifications during construction

An error in any of these tasks can result in potential professional liability to the GC.



In addition, faulty workmanship or flawed work performed during construction or installation of components of a structure may ultimately result in professional liability. Faulty workmanship can show up as a leaky roof, buckling or cracking walls, collapses or settlement issues, or problems with wiring or plumbing. While the faulty work itself should not expose the GC to professional liability, the allegations can be made of negligence in the management of subcontractors and the failure to detect such faulty work.

### SPECIALTY SUBCONTRACTORS

Often, the vicarious design liability inherent in lower-tier contracts with subcontractors goes unnoticed. For example, a mechanical / electrical / plumbing (MEP) contractor may perform some of the design, as well as the installation. In this case, the design-builder or GC holds a contract for both design and construction / installation, and assumes the liability of any negligent acts as a result of the MEP's services. This can occur for contracts related to curtain walls, glazing, exterior insulation finishing systems (EIFS), fire suppression systems, retaining walls, alarm systems, landscaping, etc. So, the key to uncovering design liability is to identify not only the design professional under a contract, but also those subcontracts that may contain an element of design.