
BY JEFFREY M. SLIVKA

Contractor's Professional Liability: Project Delivery Risks

In an industry where contract performance is frequently governed by performance specifications, ever-shortening delivery dates, and a desire for innovative outcomes, many contractors are exposed to rising professional liability risks associated with engineering, planning, specifications, construction management, and field modification activities. These exposures are determined not only by the services performed, but also by the type of contract and project delivery method under which the contractor is engaged.

This article will examine project delivery methods and their risks to help contractors strategically manage and overcome future professional liability issues.

Design-Build

Under this arrangement, the owner contracts solely with the design-builder, who typically accepts full responsibility for all project design and construction activities.

The design-builder can serve as an integrated operator and use in-house professionals (e.g., architects, engineers, and construction personnel). Or, a joint venture can be formed between the design and construction firms to fulfill the obligations of this specific effort. However, it's most common for the design-builder to subcontract the design services to a lead design professional.

In most design-build arrangements, construction begins with the plans and specifications less than 100% complete. In fact, construction has been known to start with only 30% to 40% of the planning in place on some projects. Because of this, the level of professional risk on such a project is considered to be inversely proportional to the percent completion of those plans and specifications prior to starting construction.

In other words, the less complete the plans are the greater the professional risk. While this statement can be argued, one fact is prevalent – communication between design and construction personnel is essential at every construction phase in order to reduce errors and resulting liability. Here are a few areas where caution is necessary.

Design Services

While design-build offers numerous time and cost-saving advantages for the owner, the design-builder's professional liability exposure is significantly higher since it assumes all of the project's design responsibilities.

As a result, the design-builder is directly liable for economic and other damages whether they were caused by errors and/or omissions in their design or professional services or the services performed on their behalf by the design team (vicarious professional liability).

In addition to errors committed by the design team, the design-build entity can be liable for design or engineering errors made by their hired specialty subcontractors when those subcontractors engage engineers to support their work.

So, the key to identifying potential professional services liability is not only identifying the contract's prime design professional, but also any subcontracts that may contain an element of design or engineering.

Furthermore, when plans and specifications are not available before the start of construction, the risk of design problems that could result in faulty or failed construction and resulting professional services liability later on in the project is far greater. For example, errors in foundation design that are only discovered after several stories of a vertical structure are completed could cost a significant amount to rectify.

Specifications

Contractors must be aware of the professional risk they assume through specifications, regardless of the project delivery method applied. There are generally two categories of specifications – prescriptive and performance.

Prescriptive or design specifications show the exact work to be done by the contractor, including material, equipment, dimensions, parts, etc. to be used with little to no variation allowed by the contractor.



Performance-based specifications, on the other hand, describe what result is needed or how the component or project should perform. This requires the design-builder to draw upon its own experience and expertise to select, apply, and install the proper equipment, parts, process, material, etc. to achieve the owner's desired outcome. Any errors could easily result in professional liability against the design-builder.

Building Information Modeling

BIM is a very useful design-build tool that allows for the virtual design of a structure before actual construction begins (or during early construction phases) without completed design plans and specifications.

Though the proper use of this tool reduces errors, BIM input problems can result in significant construction challenges due to the human component of design. Any damages or project delays resulting from the erroneous use or application of BIM can pose further professional services liability issues.

Construction Management Services

Furthermore, construction management services – selecting subcontractors and managing their work, establishing and maintaining budgets, field modifications, inspections, and the scheduling and sequencing of tasks – remain part of the job, even if they are not specified in the contract.

An error in any of these tasks may result in another layer of potential professional liability. This is especially a concern in the event the design-builder fails to identify faulty work installed or constructed by subcontractors, such 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 contractor to professional liability, allegations of negligent subcontractor management and/or the failure to detect or inspect the work may result in serious professional negligence claims against the design-builder.

Design-Bid-Build

In a typical design-bid-build model, the project owner first contracts with a design professional (or design professional team) to perform and complete the design plans and specifications.

Once the plans and specifications are 100% complete, the owner advertises the bid and GCs compete for the contract. The GC that is awarded the bid constructs the project according to the completed plans and specifications.

While the owner has separate and distinct contracts with both the design professional and the GC, the design professional and the GC do not have a contractual relationship with each other. The GC is protected from design liability and any errors in design plans and specifications under the *Spearin Doctrine*.¹ If the GC follows the plans and specifications and does not alter, change, or modify them in any way, then the doctrine generally shifts the design liability back to the owner and/or design professional for any and all potential professional liability.

The design-bid-build contract contains many of the exposures of the design-build and Construction Manager At Risk (CMAR) methodologies (detailed in the next section), including the use of the professional's knowledge and judgment to meet performance-based specifications, deadlines, and budgets. Consequently, professional liability issues occur if any construction errors or omissions are caused by:

- The modification of plans and specifications;
- Engineering errors in the realm of construction means, methods, and techniques; or
- The project's overall construction (and subcontractor) management.

The Construction Manager At Risk

Under the CMAR model, the owner holds two contracts:

- 1) With the design professional, and
- 2) With the CMAR, who in turn holds contracts with the subcontractors and is responsible for the completion and performance of their work.

While this structure parallels the design-bid-build method, during CMAR, additional pre-construction "consulting" services are performed throughout the design phase. These services can include, but are not limited to:

- Defining project objectives
- Site evaluation
- Conceptual schedules and budgets
- Evaluation of design professionals
- Risk identification and mitigation
- Constructability assessments
- Project phasing assessments
- Reviews of drawings and specifications
- Value engineering
- Monitoring of the design process



in IPD agreements, since it only covers claims from parties not included within the IPD contract, and the majority of professional liability claims come from the owner.

For a look at the inner workings of IPD arrangements, read "Maximize the Benefits of Integrated Project Delivery: Sharing Risks for Greater Rewards" in the September/October 2015 issue.

Defining the Risks

The construction industry is continually in flux – not only with the introduction of new building techniques and increased demand by owners, but also the methodologies with which traditional builders, owners, and designers have little or no familiarity.

Thoroughly understanding each methodology and the terms and agreements under which exposures will be created and assigned is key to protecting against professional liability. ■

Endnote

1. This doctrine's roots stem from *United States v. Spearin*, which states that a contractor is not liable for damage resulting from plan or design errors.

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