The Risk Spectrum of Construction Phase Services

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When it comes to construction phase services, have you ever worked with a client on an extremely tight budget or a contractor who has unreasonable expectations? Then you have to factor in that the construction phase of a project is the most stressful and misunderstood part of a project.

Today, we're diving into the importance of managing the risks that come with providing construction phase services and how you can learn from the mistakes of others.
Learning Objectives

Participants in this session will:

- Understand the value of being active during the construction phase of a project to you, the project team, and the public.

- Learn about the risks that develop during the construction phase of a project and how managing client expectations can benefit you, the other project participants and the community.

- Explore contract provisions and communication tools that can help you manage construction phase services while protecting public health, safety, and welfare.

- Analyze some claims that stem from problematic issues like site safety and injuries.
Construction Phase Services

- Interpret contractual requirements
- Review shop drawings
- Coordinate site visits
- Answer field questions
- Provide status updates
- Determine compliance with design intent
It’s Not Construction Management

**Construction Management**
- Professional advisory services
- Virtually all aspects of project

**Construction Contract Administration**
- Interpretations
- Work proceeding in conformity with contract documents

**Inspection**
- Compliance
- Specs and statutory requirements
- Substantial and final completion
Why It’s Important – Part I

- Prepare design
- Document how project is to be built
- Responsible for health, safety and welfare of ultimate user
Why It’s Important – Part II

Construction Contract Administration

Saving Money
Should I Provide?

- You’re liable for your design.
- Do you want someone else interpreting your design?
- Your involvement can minimize risk to you and your client.
If You Don’t Provide

Make it clear in your scope

Include contract provisions for:

- Indemnification
- Unauthorized changes to design
- Replacement
- Ownership
- Limitation of liability
- Dispute resolution
Submittal To-Do’s

- Describe your scope of services
- Demand a schedule
- Review according to contract
- Maintain detailed records
- Don’t review if not required by contract
- Demand compliance from contractor with contract
RFI Warning Signs

The answer is already in the contract documents or asked twice

There’s a latent field condition

The RFI is really:

- a statement, not a question
- a request for a substitution
- an unrequested design change
- betterment

The contractor is building a claim
Submittal and RFI Practices

Keep:

- A detailed log
- Your client informed
- Responses timely
- Stampings & Corrections
Proposed Substitutions

Review is considered an Additional Service

Do your research

“or equal to” “proprietary specs”

Document your opinion & final decision
Rejection of Work

Document findings immediately

Provide written notice to Owner

Let Owner make final decision

Follow contract re: rejection of work

Additional site presence should be “additional service”
RISK 2:

Client Expectations
§ 2.2 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 shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

AIA Document B101-2007
Misconceptions

Responsibility for contractor and zero defects

RFIs are evidence of design defects

Zero change orders

Having no contingency budget is ok

All extra costs are damages
The Problem – Client Expectations

- Expect perfect deliverables
- Demand unfair contract terms
- Use imperfection, unfulfilled expectation or deficiency as an excuse to not pay
- Require elevated standard of care
- Indemnification for any loss associated with DP’s services, even client caused
- Require correction at no cost to client and before they pay their bill
“I’m not perfect”
SOLUTIONS:

Contracts & Communication Tools
Communicate

Set expectations up front

Not “perfection”

Specifics that can lead to problems:

Designing out of sequence

Fast-track schedule

Unrealistic budget

Talk to your Client

Identify the issues and solve them quickly
Documentation

Physical
- Proposals, contracts, correspondence, memorandums, drafts, reports, drawings, specification, shop drawings, submittals, presentations, models

Electronic
- Digital emails, text messages, tweets, social media, audio and visual recordings, photographic information, anything on the “cloud”

Misc.
- Napkin drawings
Contract Clauses – Means & Methods

AIA Document B101 §3.6.1.2

EJCDC Document E-500 6.01 (I, J, & K)
§ 3.6.1.2 . . . The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Architect be responsible for the Contractor’s failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect’s negligent acts or omissions, but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work.

AIA B101-2007
Contract Clauses - Observation

AIA Document B101 §3.6.2.1

EJCDC Document E-500 Exhibit A1.05.A.7.a.
Exhibit A1.05.A.7.a.

7.a...Make visits to the Site at intervals appropriate to the various stages of construction, as Engineer deems necessary, to observe as an experienced and qualified design professional the progress of Contractor’s executed Work. Such visits and observations by Engineer, and the Resident Project Representative, if any, are not intended to be exhaustive or to extend to every aspect of Contractor’s Work in progress or to involve detailed inspections of Contractor’s Work in progress beyond the responsibilities specifically assigned to Engineer in this Agreement and the Contract Documents, but rather are to be limited to spot checking, selective sampling, and similar methods of general observation of the Work based on Engineer’s exercise of professional judgment...

EJCDC Document E-500
§ 3.6.2.1 The Architect shall visit the site at intervals appropriate to the stage of construction,...to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work...
§ 3.6.2.2. . . The Architect has the authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect shall have the authority to require inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such Work is fabricated, installed or completed.

However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees or other persons or entities performing portions of the Work.

AIA B101-2007
Contract Clauses – Certification of Pay

AIA Document B101 §3.6.3.2

EJCDC Document E-500 Exhibit A1.05.A.15.b
...Engineer shall not thereby be deemed to have represented that observations made by Engineer to check the quality or quantity of Contractor’s Work as it is performed and furnished have been exhaustive, extended to every aspect of Contractor’s Work in progress, or involved detailed inspections of the Work beyond the responsibilities specifically assigned to Engineer in this Agreement and the Contract Documents. Neither Engineer’s review of Contractor’s Work for the purposes of recommending payments nor Engineer’s recommendation of any payment including final payment will impose on Engineer responsibility to supervise, direct, or control Contractor’s Work in progress or for the means, methods, techniques, sequences, or procedures of construction or safety precautions or programs incident thereto, or Contractor’s compliance with Laws and Regulations applicable to Contractor’s furnishing and performing the Work. It will also not impose responsibility on Engineer to make any examination to ascertain how or for what purposes Contractor has used the moneys paid on account of the Contract Price, or to determine that title to any portion of the Work in progress, materials, or equipment has passed to Owner free and clear of any liens, claims, security interests, or encumbrances, or that there may not be other matters at issue between Owner and Contractor that might affect the amount that should be paid.

EJCDC Document E-500
Contract Clauses - Submittals

AIA Document B101 §3.6.4.2

EJCDC Document E-500 Exhibit A1.05.A.11
§ 3.6.4.2. . .Architect shall review and approve or take other appropriate action upon the Contractor’s submittals...for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Review of such submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor’s responsibility. The Architect’s review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures...
Contract Clauses – Duration & Visits

AIA Document B101
§4.3.3 and §4.3.4
§ 4.3.3 The Architect shall provide Construction Phase Services exceeding the limits set forth below as Additional Services. When the limits below are reached, the Architect shall notify the Owner:

.1 (« ») reviews of each Shop Drawing, Product Data item, sample and similar submittal of the Contractor

.2 (« ») visits to the site by the Architect over the duration of the Project during construction

.3 (« ») inspections for any portion of the Work to determine whether such portion of the Work is substantially complete in accordance with the requirements of the Contract Documents

.4 (« ») inspections for any portion of the Work to determine final completion...

AIA B101-2007
§ 4.3.4 If the services covered by this Agreement have not been completed within « » months of the date of this Agreement, through no fault of the Architect, extension of the Architect’s services beyond that time shall be compensated as Additional Services.
Claim Lessons
Construction Phase Liabilities

- Liability for not discovering or discovering defective work
- Liability to owner or surety on applications for payment
- Liability for job site accidents
- Liability for impacting contractor’s performance
Owner Claims

Negligence

• “You had a duty to protect me from the contractor’s bad acts!”

Breach of Contract

• “You agreed to protect me from the Contractor’s bad acts!”
“You never told me I was doing it wrong!”

“You should have saved me from my own incompetence!”
Safety isn't usually part of a design professional’s contractual duties – check your contract!

Responsibility for safety of all individuals and property generally rests with contractor

Regardless of contractual safeguards, there’s still risk to design professionals
Job Site Safety—Dos and Don’ts

Give immediate verbal notification of the specific hazard to the party with overall safety responsibility.

Address the specific safety hazard posing an imminent risk of serious harm.

Don’t give recommendations.

Give written notification to the owner (or your client) and copy the contractor.

Explain in writing that you don’t have responsibility, but this condition came to your attention and you’re notifying on a one time basis.
Hanna v. Huer, Johns, Neil, Rivers and Webb

As long as the contract states that the design professional has no liability for site safety, the design professional does not have a duty to owner or third parties for site safety issues.

Exception may be where the design professional has acknowledged knowledge of an obviously unsafe condition.
Site Safety Case Study

Carvalho, v. Toll Brothers and Developers

A design professional on a construction site is a professional and actual knowledge and observation of a clearly foreseeable danger does in fact impose a duty on the design professional to act.
Hypothetical Claim Case Study

With limited construction phase services, you’re still at risk:

- Other parties uninsured
- Sovereign immunity
Contract & Scope Language

- Reasonable standard of care
- No warranties
- No ensuring error-free plans
- No formulas for paying for errors or omissions
- No liquidated or consequential damages
- No “fit for intended purpose”
- Indemnification tied to negligence
Thank you for your time!

QUESTIONS??

This concludes The American Institute of Architects Continuing Education Systems Program

Alayne McDonald, Professional Development Coordinator
Alayne.McDonald@rlcorp.com

Abbey Brown, Client Solutions Manager
Abbey.Brown@rlcorp.com