

Can Construction Observation Help Reduce Project Risk?

BY TIM CORBETT

In years past, many design professionals felt offering construction-phase services was too risky; however, construction observation is a powerful weapon for architects and engineers in their risk management arsenal. Certain clients understand the benefits when A/E firms offer construction-phase services. However, driven by slow economic conditions, many clients are asking firms to do more with less, including reducing or eliminating construction-phase services. Other clients decide they will administer the construction contract themselves or decide to use a third party instead of the A/E firm. Clients have also held the A/E to a higher standard of care when providing construction-observation services. How do these actions affect A/E firms? It significantly increases the A/E's risk and liability exposures.

Construction-Phase Risks

Details in design documents cannot anticipate every contingency that may occur during the construction phase. If the A/E firm of record is not retained to provide clarification of the plans and specifications, the risk of misinterpretation of the contract documents increases. Bad decisions can lead to project confusion, delays, increased costs, disputes, and claims between the owner and the A/E.

The exposure of the A/E is increased due to certain owners and contractors asserting that the designer has a similar responsibility to the contractor for discovering all defects on the project. Based on this distortion and unrealistic expectation of construction observation services, owners and contractors have stated the A/E should be a guarantor of the contractor's work. These expectations

dramatically increase the A/E's standard of care and risks associated with construction-phase services. Court decisions have ruled in favor of owners, holding that the A/E has a duty to guard the owner against all nonconforming work on the project, although much of that work was completed when the firm was not present on site. Members of the plaintiff's bar continue efforts to hold the A/E accountable for this higher standard of care for construction-phase services.

Standard of Care

The A/E's construction observation standard of care, unless increased by contractual provisions or by conduct, is identified in general terms as "reasonable care for discovering and reporting nonconforming work through observation at certain times during the construction



phase, general familiarity with the work, and reporting the general progress and quality of the work as completed to the owner.” The A/E’s construction-phase service standard is clearly different from the standard for contractors, who are responsible for the means and methods of the construction process.

Assignment of Construction-Phase Risk

All parties involved in the design and construction process share in a significant amount of risk. The most effective risk management strategy is to have the party with the responsibility of providing the service retain the responsibility for managing the associated risk. When the A/E of record is not permitted to perform construction-observation services through the construction phase, it loses the ability to manage that exposure while retaining a great deal of potential liability. A/Es that provide construction-phase services are in a better position to protect the client’s interests, as well as mitigate their own risk. The design A/E is clearly in the best position to reduce misunderstandings of design intent, thereby avoiding incorrect modifications to the design that lead to disputes and claims.

Construction-Phase Risk Management Strategy

If construction-observation services are not included in the A/E’s scope of services, the A/E should protect itself against potential claims. If the client is assuming the responsibility for decisions made during the construction phase, the client or owner’s representative should also assume the risk. The party performing the observation services and administering the construction contract should assume responsibility and risk for its actions in interpreting the documents and making decisions on the project site. In turn, the A/E should be released from any claims and be indemnified for costs or problems associated with changes made by others.

The most effective approach when offering construction-phase services is with a full-time on-site project representative. With this level of construction-phase services, the chances of discovering and correcting defects in construction-phase work increases. Based on a survey of design professionals, approximately 20% of firms offer this level of construction-phase service. If a client does not select this option, the next step is visiting the site at “appropriate intervals” during the construction process. Approximately 40% of firms offer this level of service. Another 20% offer as requested by the owner, and the remaining 20% stated no construction-observation services were provided.

When providing any construction-phase services, the contract should include express language that the contractor is solely responsible for the construction site and construction means, methods, techniques, sequences, and procedures that are used to perform work, as well as job site safety.

It is important to explain the trade-offs to the client in each level of service, quality and associated fees. The client’s decision regarding construction-phase services needs to be clearly communicated and their decision documented.

Consultant Providing Construction-Phase Services

Contract provisions manage expectations and establish the ground rules and responsibilities between the parties. It is vital that clear contract provisions are developed, and agreed upon, in writing between parties prior to work commencing. The following are “sample”

contract language provisions that have been used when offering construction-observation services:

Construction Observation Services

The Consultant shall visit the site at intervals appropriate to the stage of Work in Construction in order to observe the progress and quality of the Work completed by the Contractor. Such visits and observation are not intended to be an exhaustive check or a detailed inspection of the Contractor’s work but to become generally familiar with the Work in progress and to determine, in general, if the Work is proceeding in accordance with the Contract Documents. Based on this general observation, the Consultant shall keep the Owner informed regarding the progress and quality of Work and shall endeavor to guard the Client against deficiencies in the Work. The Consultant’s Construction-phase services exceeding the visits, reviews, and observations indicated in this agreement shall be considered as Additional Services.

When providing any construction-phase services, the contract should include express language that the contractor is solely responsible for the construction site and construction means, methods, techniques, sequences, and procedures that are used to perform work, as well as job site safety. The following is “sample” language addressing this topic:

Construction-Phase Services

In the Consultant’s Construction-phase services, it is understood that the Contractor, not the Consultant, is responsible for the construction of the project, and the Consultant is not responsible for the acts or omissions of any contractor, subcontractor, or material supplier; for safety precautions, programs, or enforcement; or for construction means, methods, techniques, sequences, and procedures employed by the Contractor.

Consultant Not Providing Construction-Phase Services

Risk increases when a client does not allow the consultant to provide construction-observation services. In this scenario, the client should acknowledge the responsibility that accompanies making interpretations and changes at the project site. A waiver of all claims and indemnification for any cost associated with interpretations and changes made should apply. If the consultant is denied the opportunity to protect the design integrity and the client's interests, the contract should release the consultant from claims made by the client as well as protect the firm from any contractor or other third-party claims.

The following is a short version of sample contract language for owner responsibilities and releasing the consultant from claims:

Owner's Construction-Phase Service Responsibility

Owner assumes all responsibility for interpretation of the Contract Documents and for construction observation or review, and waives any claims against the Consultant that may be in any way connected thereto.

The following is an example of release and indemnification language:

Consultant Not Providing Construction-Phase Services

Based on the Client's decision, the Consultant's services shall not include Construction-phase services, the Client shall be solely responsible for interpreting the Contract Documents and observing the Work of the Contractor to discover, correct, or mitigate errors, inconsistencies, or omissions. If the Client authorizes deviations, recorded or unrecorded, from the documents prepared by the Consultant, the Client shall not bring any claim against the Consultant and shall indemnify and



hold the Consultant harmless from and against all claims, losses, damages, and expenses, including but not limited to defense costs and the time of the Consultant to the extent such claim, loss, damage, or expense arises out of or results in whole, or in part from such deviations, regardless of whether or not such claim, loss, damage, or expense is caused in part by a party indemnified under this provision.

Conclusion

Construction observation is a very important service that helps mitigate project risk for owners and consulting firms. Making risk management a priority is vital to any project. However, it is especially important during a slow economy when claims and litigation are on the rise. Construction observation will also be an important service when

owners restart abandoned and suspended projects, which carry their own unique risk characteristics and mitigating strategies. Some clients understand the benefits of construction-phase services, while others feel it may be redundant or an unnecessary service. In all cases, A/E consulting firms should establish firm-wide strategies that address construction-phase services in mitigating project risk as well as their own. ■



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